87-1378

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in applying the invasion-of-privacy exemptions of the Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), to a request for an individual's criminal (or other) records that are compiled by the federal government in large national data banks, a district court may conclude that the individual has a substantial privacy interest in the compiled information even though the raw data may be "matters of public record" in local government offices.

2. Whether, in applying Exemptions 6 and 7(C), a court should make an assessment of the weight of the "public interest" in the disclosure of the particular information sought, or should instead weigh in the balance only a uniform "public interest" in the disclosure of all information in the possession of the government.

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are the United States Department of Justice, the Federal Bureau of Investigation (FBI), Attorney General Edwin Meese III, and FBI Director William S. Sessions. Respondents, plaintiffs below, are The Reporters Committee for Freedom of the Press, and Robert Schakne, a CBS News correspondent.

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The Solicitor General, on behalf of the Department of Justice, the Federal Bureau of Investigation (FBI), the Attorney General, and the Director of the FBI, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals panel (App., *infra*, 1a-34a) is reported at 816 F.2d 730. The majority and dissenting opinions of the court of appeals panel on denial of rehearing (App., *infra*, 35a-49a) are reported at 831 F.2d 1124. The order denying rehearing en banc and the statement of four judges dissenting from that order (App., *infra*, 64a-66a) are unreported. The memorandum of the district court (App., *infra*, 52a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 60a-61a) was entered on April 10, 1987. A petition for rehearing was denied on October 23, 1987 (App., *infra*, 62a-63a). On January 14, 1988, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552, provides in pertinent part:

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * * * *

(B) On complaint, the district court * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; [or]

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy * * *.

STATEMENT

1. This case arises from two 1978 requests under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552. Respondents, CBS News correspondent Robert Schakne and The Reporters Committee for Freedom of the Press, filed requests with the Department of Justice for information on the criminal records of William, Phillip, Charles, and Samuel Medico. The requests sought "information about any prison sentences served in federal prisons, any convictions in federal courts, any indictments by federal grand juries or any arrests by federal law enforcement authorities," as well as "information known to the Department of Justice" concerning similar state and local matters (C.A. App. 14; see also *id.* at 25).

The principal source of any such information would be the identification records or "rap sheets" maintained by the Identification Division of the FBI. Rap sheets consist of data on the subject's arrests and convictions supplied by a variety of federal, state, and local law enforcement agencies. The FBI routinely collects and compiles these data,

pursuant to the statutory authority of 28 U.S.C. 534, and at present it maintains such files on more than 24 million persons. Further information on such matters may exist in other FBI and Justice Department files, apart from rap sheets, as a result of federal investigations.

The Department denied respondents' requests on two grounds: (1) that under 28 U.S.C. 534 and FOIA Exemption 3, 5 U.S.C. 552(b)(3), all rap sheet information is exempt from disclosure; and (2) that under FOIA Exemptions 6 and 7(C), 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), the information sought, whether contained in rap sheets or not, was exempt from disclosure because disclosure would constitute an unwarranted (and clearly unwarranted) invasion of the subjects' privacy (C.A. App. 21-22, 30).

2. Respondents filed the present action in December 1979, at this point limiting their requests for the first time to "matters of public record" (C.A. App. 9). The scope of the controversy was further narrowed in two respects during the course of the district court proceedings. First, the Department released all responsive information regarding all of the subjects except Charles Medico because those other subjects had died, and in the judgment of the Department there was therefore no longer any substantial privacy interest to be protected (*id.* at 247-266). Second, the Department made a partial disclosure with respect to Charles Medico, on the basis of a public interest in disclosure articulated by respondents in their summary judgment papers.

In those papers, respondents indicated that their inquiry was directed at uncovering evidence of illegal dealings between the Medicos and Congressman Daniel Flood, who had reportedly been involved in arranging for federal contracts for a business operated by the Medicos (C.A. App. 136-137). Respondents further suggested that the significance of the information sought would depend on the "type of criminal record involved," and they cited information regarding "a record of bribery, embezzlement, or other financial crime" as information that "would potentially be a matter of great public interest" (*id.* at 137-138). Based on this reasoning, the Department disclosed that—apart from any rap sheet information for which the Department would claim exemption from disclosure under 28 U.S.C. 534—there were no records of the sort of "financial crimes" mentioned by respondents regarding Charles Medico (C.A. App. 256). The government continued to refuse to release—or to confirm or deny the existence of—a rap sheet for Charles Medico or any other records of non-financial crimes (or alleged crimes) resulting in his arrest, indictment, conviction, acquittal, or sentence.

The district court granted summary judgment to the government in July 1985 (App., *infra*, 52a-58a). The court first ruled that 28 U.S.C. 534 qualified as a withholding statute under FOIA Exemption 3 and barred the release of rap sheet information (App., *infra*, 54a-56a). The court then held that rap sheet information, as well as any similar information that might exist in other Department files, was exempt from disclosure under FOIA Exemptions 6 and 7(C), since the release of such information would constitute an invasion of privacy that was not warranted by any public interest in disclosure (App., *infra*, 56a-58a). The court based this conclusion on its own assessment of the privacy and public interest concerns implicated in the circumstances of this case. In making that assessment, the court took into account the Department's in camera submission of any and all responsive information that had been withheld (*id.* at 57a-58a & n.2, 59a).

3. The court of appeals reversed. In the initial panel opinion, the court first held that 28 U.S.C. 534 did not qualify as a withholding statute under FOIA Exemption 3, and that rap sheets cannot be withheld on that basis (App., *infra*, 6a-13a).[1] The court went on to rule that the district court had erred as a matter of law in its application of Exemptions 6 and 7(C) (*id.* at 14a-26a).[2] The court acknowledged that these exemptions call for a balancing of the privacy interests at stake against the public interest in disclosure, but the court of appeals found reversible error in the district court's method of striking that balance.

With regard to the privacy side of the balance, the court opined that the public availability of a record at the local level—such as a conviction record in a county courthouse or an arrest record on a local police blotter—sharply attenuates any privacy interest in such information, even when it is compiled in a large, national data bank (App., *infra*, 18a-21a). The court also dismissed the government's argument that individuals have a protectible interest under FOIA in maintaining the obscurity of such records, de-

[1] We are not seeking review in this Court of the Exemption 3 holding.

[2] As the court of appeals noted (App., *infra*, 17a n.11), Exemptions 6 and 7(C) call for similar assessments, but the standards applied differ. Exemption 6, applicable generally, authorizes withholding if disclosure "*would* constitute a *clearly* unwarranted invasion of personal privacy" (5 U.S.C. 552(b)(6) (emphasis added)). Exemption 7(C), applicable only to law enforcement records, authorizes withholding if disclosure "*could reasonably be expected to* constitute an *unwarranted* invasion of personal privacy" (5 U.S.C. (Supp. IV) 552(b)(7)(C) (emphasis added)). The district court found it "clear" that the records at issue met Exemption 7(C)'s threshold criterion of having been compiled for law enforcement purposes (App., *infra*, 56a). The court of appeals assumed arguendo that Exemption 7(C) applied (*id.* at 14a-15a). See also *id.* at 28a (Starr, J., concurring) ("There can be no doubt that on its face the FOIA request here seeks 'law enforcement records or information.' ").

claring the argument "attractive as a legislative policy matter" but unrelated to the statutory term "privacy" (*id.* at 18a-19a). On the public interest side, the court began by noting the "awkwardness of * * * appraising the public interest in the release of government records" (*id.* at 21a) and sought "objective indications of the public interest" (*id.* at 23a). It found such indications in the policy determinations of state and local bodies to maintain public access to the underlying records, and it held that the district court should have deferred to those determinations in assessing the "public interest" for purposes of the FOIA balancing test (*id.* at 22a & n.13). The court remanded for further proceedings under this standard.

Judge Starr concurred in the result but expressed serious reservations about the test announced by the panel majority (App., *infra*, 27a-34a). He disagreed sharply with the majority's approach to the "public interest" side of the balancing test. While sharing to a degree the majority's discomfort with the "value-laden judgment calls" required under the balancing test, Judge Starr observed that such balancing is what Congress requires under these exemptions, and he chided the majority for "go[ing] AWOL" by declining to perform that task (*id.* at 30a).

4. The government sought rehearing on the Exemption 6 and 7(C) issues. Our rehearing submission was supported by an amicus curiae submission by Search Group International, Inc., an organization of state and local law enforcement officials, as well as agencies of the States of New York and California. These amici sought, among other things, to bring to the court's attention the complexity of state and local provisions regarding the disclosure of arrest and conviction records. In particular, amici noted that most states—which often are the direct source of data provided to the FBI for inclusion in rap sheets—treat compilations of such data as confidential at the state level,

even though the underlying information remains a "public record" locally. See, *e.g.*, N.Y. Exec. Law § 837 (McKinney 1982); Cal. Penal Code § 11077 (West 1982). Amici further noted that the panel opinion could have adverse consequences for the sharing of information by law enforcement agencies by inducing some states to decline to provide information to the FBI, in order to prevent state-compiled information from becoming widely available by means of FOIA requests.

The court of appeals denied rehearing. The panel majority, however, altered its rationale, and Judge Starr voted to grant rehearing and affirm the district court's grant of summary judgment to the government (App., *infra*, 35a-49a). The majority analyzed anew the public interest side of the balancing test (*id.* at 36a-40a). The panel abandoned its earlier reliance on state and local policy determinations as guides for the assessment of the public interest in disclosure, but it declined to articulate any alternative means of making such assessments. On the contrary, the panel indicated its view that the judiciary "cannot" in any principled way make such assessments with respect to particular government records (*id.* at 38a). The panel therefore held that the only "public interest" to be considered in Exemption 6 and 7(C) cases is the general disclosure policy inherent in FOIA, without any distinction based on the nature of the information sought. The panel held that the court must "balance" this static public interest against cognizable privacy interests in particular instances (*id.* at 40a).

With respect to the privacy side of the balancing test, the panel majority adhered to its view that there can be little if any privacy interest in information that is a matter of "public record" at any level (App., *infra*, 40a-42a). It clarified its prior opinion, however, by stating that the

relevant inquiry is a "factual" one and not a matter of deference to state and local policy determinations (*id.* at 41a).

Judge Starr, in dissent, "confess[ed] that [he] was wrong the first time around" (App., *infra*, 48a) and now vigorously disputed the panel's Exemption 7(C) analysis in its entirety. Judge Starr reiterated that the majority "fail[ed] to carry out its obligation" under the statute to make an evaluation of the public interest in disclosure of particular information (*id.* at 44a). In response to the majority's suggestion that it is impossible for judges to assess the public interest in any principled way, he pointed to case law concerning defamation of public figures as one example of a source of relevant distinctions between the public interest in one kind of information and others (*id.* at 45a-46a). Judge Starr also emphasized the distinct privacy concerns presented by "computerized data banks of the sort involved here," noting that both Congress and many states have recognized these concerns (*id.* at 44a). He stated that the panel's ruling would "have a pernicious effect on personal privacy interests in conflict with Congress' express will" (*id.* at 48a-49a). He further noted the potentially "crippling" administrative burdens the panel's ruling could impose, both by requiring federal agencies to ascertain the "public record" status of information received from outside sources and by transforming the federal government "in one fell swoop into *the* clearinghouse for highly personal information" in a variety of cases (*id.* at 46a, 48a). Ultimately, Judge Starr concluded that "[w]e should abandon right now our unfortunate departure from traditional FOIA analysis; having repented, we should then conduct an old-fashioned Exemption 7(C) balancing" (*id* at 49a). Conducting that balancing, Judge Starr concluded that the district court's determination that

the privacy interest in this case outweighed the public interest in disclosure should be affirmed (*ibid.*).

Several weeks later, the court of appeals denied the government's suggestion of rehearing en banc (App., *infra*, 64a-66a). Four dissenting judges characterized the panel's decision as "profoundly wrong," stating that "[o]pening up the vast storehouse of computerized criminal histories to FOIA requests, regardless of how remote and negligible the public interest in such sensitive documents may be, is unfortunate and misconceived" (*id.* at 66a). The dissenters observed that further review was warranted in order to "restore stability and common sense to this vital area of our law" (*ibid.*).

REASONS FOR GRANTING THE PETITION

This is a relatively straightforward FOIA case, calling for a sensible balancing of the public interest in disclosure of any criminal records concerning Charles Medico against his privacy interest in maintaining the obscurity of any such records.[3] There is no doubt that the invasion-of-privacy exemptions require "the balancing of private against public interests." *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982). Nor can there be any doubt that Congress wanted the judiciary to perform that balancing task. See 5 U.S.C. 552(a)(4)(B) (requiring de novo judicial review of withholding of records); *Department of the Air Force* v. *Rose*, 425 U.S. 352, 373 (1976) (footnote omitted) (quoting S. Rep. 813, 89th Cong., 1st Sess. 9 (1965)) ("Congress enunciated a single

[3] According to the court of appeals, which apparently examined our in camera submission to the district court, "the offenses (if any) were 'minor' and occurred over thirty years ago" (App., *infra*, 16a). We neither confirm nor deny the accuracy of that statement, but our in camera submission is, of course, available for review by this Court.

policy, to be enforced * * * by the courts, 'that will involve a balancing' of the public and private interests"). The district court faithfully performed the balancing task that Congress has assigned to the judiciary, and it held that the privacy interest outweighed any public interest in disclosure of these records.

Rather than affirm that determination, or provide some reasoned explanation of why there is a public interest in these particular records that outweighs Charles Medico's privacy interests, the court of appeals chose to use this case as a vehicle to rewrite FOIA law. When balancing the public interest favoring disclosure against the competing privacy interest, courts now must—according to the decision below—pretend that a request for information about a person who lives in quiet anonymity involves exactly as weighty a public interest as, for example, a request for information about a presidential candidate or a judicial nominee. They must likewise pretend that the public interest in disclosure of, for example, findings of fault in an individual's divorce decree on file with the Veterans Administration is exactly the same as the public interest in disclosure of records showing misuse of public office. They must also conduct a supposedly "factual" inquiry into whether any privacy interest in nondisclosure of particular records has "faded" because the constituent information is contained in a public record "somewhere in the nation" (App., *infra*, 20a)—an inquiry that the court of appeals apparently intends to require even in those cases in which neither the requester nor the federal government knows whether the information is in fact publicly available anywhere.

These novel principles conflict with prior decisions of this Court and other courts of appeals, and they constitute

an advertent attempt to make important new law.[4] Such a radical transformation of FOIA law, if it were justified at all, should come from this Court, not the court of appeals. Moreover, the transformation was accurately characterized by the dissenting judges as "profoundly wrong" (App., *infra*, 66a). The principles announced by the court of appeals flout the intent of Congress that courts engage in meaningful balancing in Exemption 6 and 7(C) cases.[5] Those principles also demean legitimate privacy interests that have heretofore received legislative recognition and judicial protection—and they result in a material decrease in privacy for millions of private individuals. Review by this Court is accordingly warranted.

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[4] There are, moreover, initial indications that the opinion in this case is being noted by other courts and may indeed engender confusion in the development of the law in this area. See *United States Dep't of the Air Force* v. *FLRA*, No. 87-1143 (7th Cir. Jan. 27, 1988), slip op. 7 (agreeing with the court below that courts may not inquire into the public interest favoring disclosure of particular information); *United States Dep't of Agriculture* v. *FLRA*, No. 86-2579 (8th Cir. Jan. 15, 1988), slip op. 9 n.3 (noting but not passing on same proposition); see also *Washington Post Co.* v. *United States Dep't of State*, No. 84-5604 (D.C. Cir. Feb. 5, 1988), slip op. 21 (repeating assertion of decision below that there is only a " 'low-level privacy interest in • • • records • • • availab[le] somewhere in the nation' "); notes 10 & 13, *infra*.

[5] As noted above, the panel assumed that this case is governed by Exemption 7(C) (App., *infra*, 14a-15a). Nevertheless, it relied on Exemption 6 precedents, and its approach would appear to apply under either exemption. The applicability of the decision below to cases under Exemption 6 as well as Exemption 7(C) enhances its "pernicious effect on personal privacy interests" (*id.* at 48a-49a (Starr, J., dissenting)). At the same time, the fact that the present case should indeed be governed by Exemption 7(C) (see *id.* at 28a (Starr, J., concurring)) makes the result below all the more troubling. The distinction between the standards of the two exemptions has always been "meaningful." *FBI* v. *Abramson*, 456 U.S. 615, 629-630 n.13 (1982); see also *Department of the Air Force* v. *Rose*, 425 U.S. at 378-379 n.16. It was made more so in 1986 when Congress amended Exemption 7(C) to permit withholding whenever release of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Subtit. N, § 1802(a), 100 Stat. 3207-48), thus easing the burden of law enforcement agencies in justifying the withholding of such records. The added burdens imposed on law enforcement agencies by the decision below (see pp. 19-22, *infra*) are thus especially inappropriate.

1. The court of appeals dismissed any privacy interest in any records covered by respondents' requests as "insignificant" (App., *infra*, 20a) in light of respondents' limitation of those requests to "matters of public record." This analysis wholly ignores the practical differences between information contained in dispersed, obscure local records and information contained in a centralized national data bank and accessible by individual names. It also fails to provide a workable standard for agency actions.

a. The court of appeals treated as "novel" the question whether there can be *any* privacy interest in information "that [is] made available by municipal, state or federal agencies to any member of the public" (App., *infra*, 16a). It went on to reject out of hand the notion that a practical assessment of the information sought—considering such factors as its age and general ignorance of its existence or possible location—has any proper place in determining the strength of any cognizable privacy interest in it (*id.* at 18a-19a). Accordingly, while stopping just short of holding that there can be *no* privacy interest in such circumstances, the court concluded that, if the underlying information is "freely available to the general public" at any local level, "any privacy interest" in such information "seems insignificant" (*id.* at 20a).

Both the approach and the conclusion of the court of appeals are at odds with previous pronouncements of this Court. In *Department of the Air Force* v. *Rose, supra*, this Court addressed for the first time the nature of the balancing test to be applied under Exemption 6. The Court indicated that, in assessing the weight of the privacy interests at stake, a court should take into account practical considerations such as the likelihood that persons with prior access to the information may not have realized its significance or may have forgotten what they once knew (see 425 U.S. at 380-381). As the court of appeals decision affirmed in *Rose* elaborated, "a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information" (*Rose* v. *Department of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974)). The mechanistic approach of the court of appeals in the present case—which treats all information contained in "public records" as equally nonprivate even if the information is not in fact generally known and is not accessible as a practical matter except through national data banks—conflicts with the Second Circuit's *Rose* decision and ignores this important element of personal privacy.

This Court has previously considered and rejected a similarly mechanistic approach to the FOIA privacy exemptions, which likewise sought to substitute a per se rule for the careful balancing of interests. In *United States Dep't of State* v. *Washington Post Co., supra*, the Court reversed the District of Columbia Circuit's ruling that the "similar files" subject to Exemption 6 are limited to files reflecting "intimate details," holding instead that the exemption applies broadly to information " 'the disclosure of which might harm the individual,' " and that it is "the balanc[e] of private against public interests, not the nature of the files in which the information was contained, [that] should limit the scope of the exemption." 456 U.S. at 599

(quoting H.R. Rep. 1497, 89th Cong., 2d Sess. 11 (1966)). In the same vein, the Court observed that even data that are "not normally regarded as highly personal"—in particular, such mundane matters as "place of birth, date of birth, date of marriage, [and] employment history"—"would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy" (456 U.S. at 600). That observation is difficult if not impossible to reconcile with the view taken below that there is, of necessity, only a "low-level privacy interest" in any records that happen to be "public[ly] availab[le] somewhere in the nation" (App., *infra*, 19a-20a).

Although *Washington Post* dealt principally with the threshold issue of the definition of "similar files" under Exemption 6, the court of appeals in the present case erred in not heeding its more general teachings about the breadth of the privacy concerns to be considered under FOIA, and the importance of conducting a genuine balancing of interests instead of retreating into per se rules. In addition, the court misconstrued this Court's commentary in *Washington Post* on the particular matter of requests for "public records." That case involved a request for information regarding whether certain individuals held United States passports. In remanding for the court of appeals to conduct an Exemption 6 balancing, the Court stated that "the fact that citizenship is a matter of public record somewhere in the Nation *cannot be decisive*" (456 U.S. at 603 n.5 (emphasis added)).[6] The court of appeals in the present case has gone counter to that admonition by

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[6] The Court added that "[t]he public nature of information *may* be a reason to conclude, under *all* the circumstances of a given case, that the release of such information would not constitute a 'clearly unwarranted invasion of personal privacy' " (456 U.S. at 603 n.5 (emphasis added)).

treating the public record status of criminal history data "somewhere in the Nation"—even if only in a county courthouse or police station—as the decisive element in its "deference-driven, single-factor test" (App., *infra*, 48a (Starr, J., dissenting)). In essence, the court held that any person who has ever been arrested in a village that does not treat arrests as *secret* has no significant privacy interest, ever, in the fact of his arrest.

b. In narrowly circumscribing the "privacy" interests relevant under FOIA, the court of appeals has not only acted inconsistently with this Court's teachings but also departed from the language and history of the statute itself. The court has also ignored the well-recognized and unique privacy concerns raised by centralized compilations of criminal and other data on individuals by government agencies.

The statutory phrase that the court construed in this portion of its opinions was simply "personal privacy.' The court observed that "[w]hat is encompassed by the 'personal privacy' language of FOIA is, of course, a question of legislative intent, but there is no suggestion in the legislative history of Exemption 7(C) that 'privacy' as used in the exemption has other than its ordinary meaning" (App., *infra*, 16a-17a). Yet the court has, we submit, given that statutory term a meaning that is far more restrictive than its ordinary usage.[7]

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[7] The court of appeals faulted as overbroad our submission that, "if the release of the records causes any embarrassment or harm to a subject's reputation, then such release necessarily results in an 'invasion of personal privacy' " (App., *infra*, 18a). The court found our position "attractive" but unsupported by "the FOIA or its legislative history" (*id.* at 19a). The legislative history, however, squarely supports our position. "The limitation of a 'clearly unwarranted invasion of personal privacy' [in Exemption 6] provides a proper balance between the protection of an individual's right of privacy and the preservation of

In common parlance, "privacy" is not limited to those matters concerning an individual that are officially confidential. The term "privacy" is defined as "the quality or state of being apart from the company or observation of others." *Webster's Third New International Dictionary* 1804 (1981). Thus, contrary to the "plain language" argument advanced by the court of appeals (App., *infra*, 16a-18a), neither the statute itself nor the Senate report's reference to "private affairs" supports the notion that a local government's failure to take steps to conceal information means that there is no privacy interest in it.

In legal terminology, "privacy" has been applied to a wide range of interests protected by tort law and the Constitution. See generally W. Prosser & R. Keeton, *The Law of Torts* 849-869 (5th ed. 1984); *Carey* v. *Population Services International*, 431 U.S. 678, 688-689 (1977). It has been defined as "the individual's right to control dissemination of information about himself." A. Breckenridge, *The Right to Privacy* 1 (1970). It is often defined more simply as "the right to be let alone." *E.g.*, W. Prosser & R. Keeton, *supra*, at 849 (quoting T. Cooley,

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the public's right to Government information by excluding those kinds of files *the disclosure of which might harm the individual.*" H.R. Rep. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added); see *Washington Post*, 456 U.S. at 599 (emphasizing the quoted language); *id.* at 601 (repeating the same language). We do not, of course, contend that all information whose disclosure would "harm the individual" is per se exempt from disclosure; such an argument would indeed "prove[] too much" (App., *infra*, 19a) . We do, however, emphatically contend—contrary to the position of the court of appeals—that harm to the individual resulting from the federal government's disclosure of information about him is a privacy interest that always deserves to be *considered* in the Exemption 6 or 7(C) balance, and that its significance turns on a realistic appraisal of the degree of harm that would be caused by disclosure, not on a reflexive insistence that all "public records" give rise to only a "low-level privacy interest."

Torts 29 (2d ed. 1888)). There is no reason to doubt that Congress intended, in FOIA, to reach the individual's privacy interest in information about himself that is not in fact known to the world at large, even if it is theoretically lawfully available to one who knows where to look.

There has been widespread concern that privacy is, as a practical matter, threatened by the availability of compiled information in large, centralized government data banks, which offer ready access to records that may be "public" in some sense but would otherwise be widely dispersed. See generally R. Smith, *Compilation of State & Federal Privacy Laws* v (1984-1985 ed.); Lautsch, *Digest and Analysis of State Legislation Relating to Computer Technology*, 20 Jurimetrics J. 201, 210-211 (1980). Numerous governmental entities have recognized the need to protect the subjects of such information against inappropriate disclosure. As noted by Judge Starr in dissent, for example, a "host of state laws" protect the very sort of criminal history compilations at issue here from disclosure (App., *infra*, 44a; see also R. Smith, *supra*, at 3-4).

As Judge Starr also noted, the legislative history of the Privacy Act clearly evinces Congress's concern about the threat to privacy posed by compiled information. App., *infra*, 44a (citing H.R. Rep. 93-1416, 93d Cong., 2d Sess. 3, 6-9 (1974), *reprinted in* Staff of the Joint Comm. on Government Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974, Source Book on Privacy* 296, 299-302 (Joint Comm. Print 1976)). Congress has also required, in connection with federal grants to state and local agencies to support the collection of criminal history information, assurance that "the security and *privacy*" of such information is maintained, and that it "shall only be used for law enforcement and criminal

justice and other lawful purposes." 42 U.S.C. 3789g(b) (emphasis added).[8]

The court of appeals erred in equating the "privacy" interest in information with official secrecy at every level of government where the information is maintained. An individual has a practical privacy interest in arrests and other incidents that occurred in the distant past, even if they are not officially confidential. If the information becomes available to "any person" (5 U.S.C. 552(a)(3)) through a single FOIA request to the FBI and no longer requires a search of courthouses and police blotters across the nation—many not indexed by name—the individual's life will be a good deal less private.[9]

c. The court of appeals' ruling also imposes novel and unworkable requirements on federal agencies. The FBI

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[8] In the legislative history of that provision, Congress referred to "the unsettled and sensitive issues of the right of privacy and other individual rights affecting the maintenance and dissemination of criminal justice information." S. Conf. Rep. 93-349, 93d Cong., 1st Sess. 32 (1973).

[9] To be sure, this Court has construed the First Amendment to preclude the imposition of tort liability for "invasion of privacy" on those who publish truthful information gleaned from public records of court proceedings. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). But the apparently absolute right of the press to publish such information once in its possession is, we submit, more reason—not less—to be circumspect in making the federal government an *additional* source of information merely because it is publicly available "somewhere in the nation." The rationale of *Cox Broadcasting* is not—as the court of appeals seemed to think (App., *infra*, 20a)—that the public availability of information somewhere renders any remaining privacy interest in that information insignificant. Rather, this Court recognized that it was dealing with a "sphere of collision between claims of privacy and those of the free press," with legitimate interests to be considered on both sides (420 U.S. at 491). Congress has directed the courts also to consider the legitimate interests on both sides of the Exemption 6 or 7(C) balance.

often will not know, without further inquiry, whether a particular rap sheet entry is reflected in local "public records." Even if the state agency that submitted an arrest record considers it confidential, for example, such a record may still be "public" at its original source. And the FBI would have no way of knowing, without a specific inquiry at the time of the FOIA request, whether particular information has been removed from the public record by the state or local government. The administrative burden imposed by this aspect of the court's opinion would be "substantial (if indeed not crippling)" (App., *infra*, 46a (Starr, J., dissenting)).[10]

A requirement that agencies ascertain, at the time of each FOIA request, the status of particular information under local law imposes a new obligation on agencies, which is to be found nowhere in FOIA itself. See generally *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975) (condemning court-imposed requirement that agencies generate new records in order to respond to FOIA requests). But the court of appeals' analysis affords an agency no other way of protecting even the conceded privacy interest in information that is secret at all levels of government. Although the court suggested that the FBI might fulfill its obligation by referring the requester to the providing agency (App., *infra*, 26a), such a response would

[10] A subsequent decision of the court of appeals confirms that its approach to privacy interests under Exemptions 6 and 7(C) will make it essential for agencies to ascertain the "public record" status of requested information. In *Ostrer* v. *FBI*, No. 86-5445 (Jan. 19, 1988) (unpublished), a case involving FBI rap sheets, the court remanded for further consideration in light of its decision in the present case. In so doing, the court stated: "In order to evaluate the privacy interest, *we need to know* whether the information in the 'rap sheets' has been placed in the public domain by any local, state, or federal agency • • •." Slip op. 9 (emphasis added).

tell the requester that the subject "has an arrest record"—incomplete yet damaging information that may be all the requester cares to know.[11]

While imposing such a dilemma on any agency is contrary to general FOIA principles and the policies of Exemption 6, doing so in the present case is particularly misguided, since it fails to take any account of Congress's special concern for law enforcement records and information, as reflected in Exemption 7(C). As noted above, Congress amended that exemption in 1986, to permit withholding when release of the information "*could reasonably be expected to* constitute an unwarranted invasion of personal privacy" (new language emphasized). This change was made "with the avowed purpose of '• • • eas[ing] considerably a Federal law enforcement agency's burden in invoking [the exemption].' " See *Irons* v. *FBI*, 811 F.2d 681, 687 (1st Cir. 1987) (quoting 132 Cong. Rec.

[11] In its opinion on rehearing, the panel majority attempted to turn this argument around, characterizing our assertion that referral of requests to the original sources is "tantamount to disclosure" as an admission that the information is the same, whether it comes from FBI rap sheets or local arrest records, and therefore that the issue of compilation is "immaterial" (App., *infra*, 41a (citing *FBI* v. *Abramson*, 456 U.S. 615, 624 (1982)). The majority erred, however, in its supposition that the form in which information is compiled or transferred is *always* irrelevant to FOIA analysis. Although this Court in *Abramson* held that "law enforcement" records do not lose their status as such for Exemption 7 purposes by virtue of being incorporated into other kinds of records, it distinguished the case of internal agency records, which *can* lose their exempt status under Exemption 5, 5 U.S.C. 552(b)(5), by virtue of inclusion in final agency decisions (456 U.S. at 630). In each instance, the Court observed, the result is dictated by the purposes behind the particular exemption invoked (*ibid.*). For the reasons stated in the text, the purposes behind Exemptions 6 and 7(C) require that courts take into account the unique privacy concerns raised by large compilations of dispersed personal data.

S16504 (daily ed. Oct. 15, 1986)).[12] Rather than requiring the FBI to ascertain the status of records under local laws, the courts should allow it to make a practical assessment of a disclosure's "reasonably expected" impact on privacy interests, in light of pertinent factors such as the age and notoriety of the information requested and its potential for harm. Under this standard, the assessment made by the FBI in the present case—as confirmed by the district court's de novo review—should have been upheld.

2. The court of appeals made an even more radical departure from settled law in its treatment of the "public interest" side of the balance. Rather than engaging in the straightforward weighing of competing interests that the statute calls for, the court has "go[ne] AWOL" (App., *infra*, 30a (Starr, J., concurring)), asserting that it "cannot" make any assessment of the particular public interest in the disclosure of any specific information (App., *infra*, 38a). This analysis—which the court stated (*ibid.*) would apply to Exemption 6 as well as Exemption 7(C)—is inconsistent with Congress's expressed will and conflicts sharply with what had previously been the uniform practice of the courts of appeals.

a. In *Department of the Air Force* v. *Rose, supra*, this Court reviewed the legislative history of Exemption 6 and concluded that Congress, in calling for judicial assessments of whether particular disclosures would constitute "unwarranted" invasions of privacy, intended "'* * * a balancing' of the private and public interests" (425 U.S. at 373; see *Washington Post*, 456 U.S. at 599). Although this Court has not previously had occasion to elaborate on the manner in which courts are to evaluate

[12] Section 1804(a) of the Freedom of Information Reform Act of 1986, 5 U.S.C. (Supp. IV) 552 note, expressly made these amendments applicable to pending cases. The court of appeals recognized the applicability of these provisions (App., *infra*, 14a).

the "public interest" side of this balance, it had appeared self-evident, until the decision in the present case, that this inquiry entails an assessment of the degree to which the public interest will be furthered by the release of the particular information sought, not merely the invocation of an assumed but static "public interest" in the release of *any* information in the government's possession. The courts of appeals have therefore regularly made such assessments in the course of conducting the balancing of privacy and public interests for this purpose, and the ultimate decision whether to order disclosure has often turned, at least in part, on the weightiness of the public interest in disclosure of particular information.[13]

[13] See, *e.g.*, *Columbia Packing Co.* v. *United States Dep't of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977); *Aronson* v. *United States Dep't of HUD*, 822 F.2d 182, 185-186 (1st Cir. 1987); *Committee on Masonic Homes* v. *NLRB*, 556 F.2d 214, 220-221 (3d Cir. 1977); *Core* v. *United States Postal Service*, 730 F.2d 946, 948-949 (4th Cir. 1984); *Heights Community Congress* v. *Veterans Administration*, 732 F.2d 526, 529-530 (6th Cir.), cert. denied, 469 U.S. 1034 (1984); *Minnis* v. *United States Dep't of Agriculture*, 737 F.2d 784, 786-787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *Campbell* v. *United States Civil Service Comm'n*, 539 F.2d 58, 62 (10th Cir. 1976); *Cochran* v. *United States*, 770 F.2d 949, 956 (11th Cir. 1985). Indeed, the District of Columbia Circuit has engaged in such analysis on many occasions. See, *e.g.*, *Senate of the Commonwealth of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (1987). The panel majority in fact recognized that "[p]rior cases of this circuit have purported to appraise and value the public interest in specific information sought" (App., *infra*, 37a (footnote omitted)), but apparently those cases now stand overruled. The court of appeals has subsequently reaffirmed its new position that "the phrase 'public interest' does not mean 'anything more or less than the general disclosure policies of the statute.' " *Ostrer* v. *FBI*, slip op. 8; accord *United States Dep't of the Air Force* v. *FLRA*, No. 87-1143 (7th Cir. Jan. 27, 1988), slip op. 7.

The court of appeals here rejected this approach to public interest analysis under FOIA, stating that it found the assessment of the public interest in particular cases "awkward[]" and doubted its authority to make such "idiosyncratic determinations" (App., *infra*, 23a).[14] But the difficulty of evaluating the public interest does not give the courts license to ignore Congress's instruction to engage in a meaningful balancing of the interests at stake, which inevitably includes an assessment of the public interest favoring disclosure of particular information.[15] As the Senate report discussion of Exemption 6 states, "[i]t is not an easy task to balance the opposing interests, but it is not an impossible one either." S. Rep. 813, 89th Cong., 1st Sess. 3 (1965), *quoted in Rose*, 425 U.S. at 373 n.9.[16]

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[14] One of the reasons cited by the court of appeals for its refusal to make such assessments is its inability to "foresee * * * how the information will eventually be used" and its conclusion that the purposes of the particular requester are irrelevant (App., *infra*, 38a; see also *id.* at 23a-26a). Although we agree with the court's view that the Exemption 6 or Exemption 7(C) balance does not vary from case to case depending on the identity of the requester, it is a far different proposition to say that the "public interest" side of that balance does not vary from case to case depending on what information is sought. Even if the nature and purposes of a *particular request* are legally irrelevant to analysis under Exemptions 6 and 7(C), a court can and should make an assessment of the public interest in the disclosure of *particular information* to "any person" (5 U.S.C. 552(a)(3)) on demand.

[15] The court of appeals went as far as speculating that the "public interest" may be so inherently vague a legal standard that it cannot be applied by the federal courts without exceeding constitutional limitations on the role of the judiciary (App., *infra*, 23a). Congress, however, has certainly assumed to the contrary; a LEXIS search reveals that this phrase occurs more than a thousand times in the present United States Code.

[16] The court of appeals went particularly far astray when it claimed (App., *infra*, 39a n.3; cf. *id.* at 25a & n.18, 39a & n.2) that its analysis

The court of appeals was not the first to observe that the public interest in disclosure of particular information may be difficult for the judiciary to measure. The court's concern about the awkwardness of judicial appraisals of the public interest was recognized—and answered—almost a century ago (Warren & Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 214 (1890) (footnote omitted)):

> The right to privacy does not prohibit any publication which is of public or general interest.
>
> In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest. There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law,—for instance, in that large class of cases in

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was supported by *FBI* v. *Abramson*, 456 U.S. 615 (1982). Although this Court did state in *Abramson* that "Congress * * * did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis" (456 U.S. at 631 (footnote omitted)), the Court certainly did not mean to disparage case-by-case balancing in the interpretation of the phrase "unwarranted invasion of personal privacy" in Exemptions 6 and 7(C). Rather, as Judge Starr pointed out (App., *infra*, 32a-34a), this Court made the quoted statement *after* observing (456 U.S. at 623) that it was undisputed in *Abramson* that the requested disclosure would be an unwarranted invasion of personal privacy. The Court found case-by-case balancing to be inappropriate in determining whether the requested records were "compiled for law enforcement purposes" (5 U.S.C. 552(b)(7)), not in determining whether law enforcement records met the other requirements of Exemption 7. Indeed, it was just one week before deciding *Abramson* that this Court emphasized—in a unanimous decision—the vital importance of judicial balancing to proper application of FOIA's invasion-of-privacy exemptions. *United States Dep't of State* v. *Washington Post Co.*, *supra*.

which the reasonableness or unreasonableness of an act is made the test of liability.

See also, *e.g.*, *Dun & Bradstreet* v. *Greenmoss Builders*, 472 U.S. 749, 757-761 (1985) (plurality opinion) (requiring courts to determine, for purposes of First Amendment law, whether particular publications are on matters of "public concern"); *Connick* v. *Myers*, 461 U.S. 138, 143 & n.5 (1983) (same); *Rankin* v. *McPherson*, No. 85-2068 (June 24, 1987), slip op. 6 (same); cf., *e.g.*, *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979) (requiring courts to balance the public interest against private interests in particular cases in order to determine whether grand jury transcripts should be publicly released). The notion that courts "cannot" measure the public interest in disclosure of particular information and are therefore excused from that congressionally assigned task (App., *infra*, 38a) is thus a marked departure from traditional jurisprudence.[17]

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[17] The court of appeals did not claim any specific support in the language or legislative history of FOIA for its holding that courts should not measure the public interest favoring disclosure in particular cases. There is no reason whatever to suppose that Congress was as reluctant as the court of appeals to assign that task to federal judges in the invasion-of-privacy exemptions of FOIA. Ironically, the same court that was so adamant in this case about the limited or nonexistent capacity of federal judges as such to make assessments of the public interest has more recently issued a ringing defense of the capacity and perceived duty of federal judges to make—as part of the Exemption 6 inquiry—assessments of the likelihood that official disclosure of an Iranian official's status vis-à-vis U.S. citizenship will or will not lead to death or serious harm to that official within Iran. *Washington Post Co.* v. *United States Dep't of State*, No. 84-5604 (Feb. 5, 1988), slip op. 9-16; see, *e.g.*, *id.* at 15 n.63 (quoting legislative history praising " 'wisdom and good judgment' " of the judiciary and indicating that judiciary is to be " 'trusted to act in the public interest' ").

b. As the dissent below noted, "there *is* meaning in the public-interest standard" (App., *infra*, 45a (Starr, J., dissenting)). There are ways—rejected by the panel majority—in which a court can give structure to this analysis and avoid the standardless inquiry that troubled the court here. One basic line of demarcation was suggested by this Court in *Rose*. As the Court noted in that case, "Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny' " (425 U.S. at 372 (quoting court of appeals opinion, 495 F.2d at 263)). As the Court has elsewhere elaborated, that "basic purpose" of FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Accordingly, several courts of appeals have indicated that the "public interest" side of the balancing under Exemption 6 is to be assessed in light of these "basic purposes" of FOIA.[18] Such considerations are, as the dissent

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[18] See *Columbia Packing Co.* v. *United States Dep't of Agriculture*, 563 F.2d at 499; *Committee on Masonic Homes* v. *NLRB*, 556 F.2d at 220; *Minnis* v. *United States Dep't of Agriculture*, 737 F.2d at 787; *Cochran* v. *United States*, 770 F.2d at 956; see also Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L. L. Rev. 596, 606-610 (1976) (proposing such a test). The District of Columbia Circuit itself had previously suggested that "the public interest considerations" supporting disclosure in particular cases, even if not "limited to those at the core of the Act," at least varied from case to case and were strongest when a grant of the FOIA request would serve the Act's basic purpose rather than "the more general public interest in disclosure." *Ditlow* v. *Shultz*,

below indicates, directly pertinent to disclosure requests such as the one at hand: "Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant public interest—one that overcomes the substantial privacy interest at stake—in the rap sheet of a public figure or an official holding high government office" (App., *infra*, 45a (Starr, J., dissenting); cf. Warren & Brandeis, *supra*, 4 Harv. L. Rev. at 215-216 (making similar point)). Likewise, the age and type of offenses reflected in a rap sheet are "powerfully relevant" to a sensible ascertainment of whether there is any real "public interest" in disclosure (App., *infra*, 31a (Starr, J., concurring)). As the dissent below concluded, an assessment of these factors in the present case reveals that there was at most a "limited public interest" in the disclosure of the information sought (*id.* at 49a (Starr, J., dissenting)).[19]

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517 F.2d 166, 172 (1975); see *Arieff* v. *United States Dep't of the Navy*, 712 F.2d 1462, 1468 (1983). According to the decision below, however, the more general interest is *all* that a court may consider.

[19] The court below maintained that "the government is utterly incapable of explaining to us why the information sought here does not serve the Act's 'core' policy" (App., *infra*, 38a). We respectfully disagree. Public disclosure of the criminal records (if any) of Charles Medico would not serve the Act's core policy because Charles Medico is not himself a public official, and, although he is alleged to have had dealings with a former public official, no Medico "financial crime" records that arguably might bear on that official's discharge of the functions of government exist. In the absence of any other alleged connection of Charles Medico to the functioning of our government, it seems quite plain that nothing in his criminal records (if any) would aid an informed citizenry in the exercise of democratic political choices. Likewise, we would indeed "seriously argue[]" in an appropriate case "that as a matter of law an 'informed citizenry' should

The decision below, by refusing to evaluate the public interest in disclosures of particular information in light of the basic purposes of FOIA, conflicts with the decisions of the other courts of appeals cited above. As a result, moreover, it would permit—virtually automatically—the disclosure of arrest records, or any of a wide variety of personal records compiled by the federal government, about "one's otherwise inconspicuously anonymous next-door neighbor."[20] The ruling, if followed, would also predictably lead to wide-scale use of FOIA by employers, credit bureaus, and others as a routine check on individuals, making the federal government, in the words of the dissent below, "*the* clearinghouse for highly personal information" (App., *infra*, 48a (Starr, J., dissenting)). This Court should grant certiorari in this case to correct the serious errors of the District of Columbia Circuit's analysis, and "restore stability and common sense to this vital area of our law" (App., *infra*, 66a).

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have available to it arrest records two years old but not five or ten" (*ibid.*). A court can draw a line even when it is not a bright line or the only possible line.

[20] The dissent below summarized information that we supplied in our petition for rehearing concerning such matters (App., *infra*, 48a (Starr, J., dissenting)):

> Veterans Administration and Social Security records include birth certificates, marriage licenses, and divorce decrees (which may recite findings of fault); the Department of Housing and Urban Development maintains data on millions of home mortgages, that are presumably "public records" at county clerks' offices.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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FEBRUARY 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 85-6020, 85-6144

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL. (Two Cases)

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 79-03308)

Argued Oct. 15, 1986
Decided April 10, 1987

Before: STARR and SILBERMAN, Circuit Judges, and MCGOWAN, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Concurring opinion filed by Circuit Judge STARR.

SILBERMAN, Circuit Judge:

This appeal is from a summary judgment entered by the district court dismissing a suit brought by Robert Schakne, a CBS News correspondent, and The Reporters Committee

for Freedom of the Press ("Reporters"), an association of journalists, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B) (1982). Reporters and Schakne sought to compel the Department of Justice and the Federal Bureau of Investigation to produce "any records indicating any arrests, indictments, acquittals, convictions and sentences of Phillip Medico, Charles Medico, or Samuel Medico, by state, local or federal law enforcement agencies or courts."[1] But Reporters and Schakne limited their request to documents containing information that was a "matter[] of public record."

Schakne's original FOIA request, filed with the Department of Justice on February 3, 1978, was not so limited, and sought in addition records on William Medico, the deceased brother of the above-named individuals. When the request was denied Schakne sent letters of appeal to the Department of Justice Office of Privacy and Information Appeals, stating for the first time that "most, if not all, of the requested documents would be on the public record in the jurisdiction in which the criminal justice procedures were invoked." On June 14, 1978, Quinlan Shea, director of the office, affirmed the denial with respect to the living individuals, citing FOIA privacy Exemptions 6 and 7(C). Shea, however, modified the initial denials by ordering the release of records relating to the deceased

[1] Information of the type Reporters and Schakne seek might be kept in twenty different offices or components of the Department of Justice. The Criminal Division, the Drug Enforcement Administration, and the Federal Bureau of Investigation are examples. The FBI alone maintains four separate records systems containing information relating to criminal investigations: the FBI Identification Division Records System; the Central Records System; the National Crime Information Center; and the Electronic Surveillance Indices.

William Medico. Schakne thus received what was purported to be the only record the Department of Justice and the FBI had on William Medico: his "rap sheet."[2]

Reporters also filed a request with the Department of Justice on September 21, 1978, calling for the same documents sought by Schakne. The request was denied, the denial appealed, and on January 15, 1979, the Office of Privacy and Information Appeals affirmed the denial in full, citing Exemption 7(C), and Exemption 3 in conjunction with 28 U.S.C. § 534(b) (1982). On March 13, 1979, in response to an inquiry by CBS News, Attorney General Griffin Bell explained that while "criminal history contained in *other* Department of Justice files might be released if not otherwise exempt under the Freedom of Information Act," the Department of Justice was "prohibited by statute and case law from releasing . . . 'rap sheets,' " and therefore rap sheets were exempt under Exemption 3. The June 14, 1978 release of the deceased William Medico's rap sheet was described as a mistake—the result of earlier confusion over the Department's position.

Attorney General Bell's letter did not fully explain the Department's policy regarding release of rap sheets. Ap-

[2] Rap sheets, or "identification records," are FBI records on individuals whose fingerprints have been submitted to the FBI in connection with arrests and, in certain instances, employment, naturalization and military service. *See* 28 C.F.R. § 16.31 (1986). A rap sheet typically contains information concerning an individual's arrests, indictments, convictions and imprisonments, and a notation of the source of the information. The FBI Identification Division does not itself generate the information on rap sheets, but rather compiles information received from local, state and other federal authorities. Rap sheets are kept in the Identification Division Records System, are copied in computerized (although less complete) form in the Computerized Criminal History files of the National Crime Information Center, and are sometimes also held in the Central Records System.

parently there are two circumstances under which the Department—despite lacking explicit statutory authorization—believes that it has discretion to release rap sheets (or the information contained on them) to private citizens. First, the Department will release rap sheets to the subject of the rap sheet, 28 C.F.R. § 16.32 (1986), because of "a determination that 28 U.S.C. [§] 534 does not prohibit the subjects of arrest and conviction records from having access to those records." Department of Justice Order No. 556-73, 38 Fed.Reg. 32,806 (1973). Second, the Department's regulations provide that rap sheets can be made available "[f]or issuance of press releases and publicity designed to effect the apprehension of wanted persons. . . ." 28 C.F.R. § 20.33(a)(4) (1986). This "wanted persons" exception exists, according to the Department's brief, because it is "plainly among the 'coordinated law enforcement activities . . .' that § 534 was designed to facilitate."[3]

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[3] The Department also releases rap sheets when directed to do so by statute. There are apparently four such statutory provisions. First, 28 U.S.C. § 534(a)(4) requires the Department to exchange rap sheets with "authorized officials of the Federal Government, the States, cities and penal and other institutions." Second, the Department of Justice's 1973 Appropriations Act provided for "the exchange of identification records with officials or [sic] federally chartered or insured banking institutions . . . and, if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing. . . ." Act of October 25, 1972, Pub.L. No. 92-544, 86 Stat. 1115 (1972). Third, the Attorney General is authorized to "process" specified inquiries (accompanied by fingerprints) submitted by private entities in the securities industry. Securities Acts Amendments of 1975, § 14, 15 U.S.C. § 78q(f)(2) (1982). Finally, the Attorney General has similar authority with respect to inquiries by applicants for registration with the Commodities Futures Trading Commission. Futures Trading Act of 1978, § 17, 7 U.S.C. § 12a(1) (1982).

Reporters and Schakne were not satisfied with the government's response, and filed suit on December 7, 1979. On October 1, 1981, the court ordered the Department to a file a *Vaughn* index detailing the exact nature of the documents being withheld, and an affidavit explaining, *inter alia*, the extent of the search conducted on behalf of Reporters and Schakne. In response to the court's order, the FBI conducted an "expanded" search of its Central Records System, discovered an additional document that made references to the deceased William Medico, and released the document. But the FBI refused to submit an index of the records withheld, explaining in an affidavit that public acknowledgment of the mere existence of such information requested by Reporters and Schakne might constitute a clearly unwarranted invasion of the subject's personal privacy.

While the suit was pending, Phillip and Samuel Medico died, leaving only one subject of the request—Charles Medico—still living. On April 29, 1983, the chief of the FBI's Freedom of Information—Privacy Acts Section, Records Management Division sent Reporters and Schakne letters indicating that since Phillip and Samuel Medico had died, the FBI would release "any FBI records responsive to [the] FOIA request" concerning the two—in order "[t]o be consistent" with the previous release of the records of the deceased William Medico. Insofar as this decision offered release of rap sheets of deceased subjects, it was plainly inconsistent with the Department's position that the Department was prohibited from releasing rap sheets to third-party members of the general public. The Department's brief explains the action as an effort to "largely moot the present controversy." The FBI attached to the letters copies of a document from the Central Records System containing references to Phillip Medico,

and revealed that in fact there were no rap sheets on Phillip or Samuel Medico. With regard to Charles Medico, the still living subject of the request, the FBI partially abandoned the Department's earlier position that the records (other than rap sheets) were exempt from release under Exemption 7(C), and stated "any financial crime information which might be contained in the FBI Central Records System could be disclosed in the public interest." No such information was released, however, because none existed. The Department of Justice Criminal Division and the Drug Enforcement Administration also wrote similar letters on the same date to Reporters and Schakne, indicating that no records at all had been found on Phillip and Samuel Medico, and that no "financial crime information" had been found on Charles Medico.

The district court then dismissed the suit. The only records the Department still refused to release (or acknowledge the existence of) were Charles Medico's rap sheet and records (other than rap sheets) containing "non-financial crime" information on Charles Medico. The court held that Charles Medico's rap sheet would be exempt from disclosure under FOIA because 28 U.S.C. § 534 was an Exemption 3 withholding statute that "specifically exempt[s]" rap sheets from disclosure by requiring they "be withheld from the general public in such a manner as to leave no discretion on the issue." Further, after reviewing an *in camera* submission by the government, the court held that any other records on Charles Medico containing "non-financial crime" information would be exempt from release under FOIA privacy Exemptions 6 and 7(C).

I.

Normally, when we construe statutes first interpreted by executive departments or independent administrative

agencies we are obliged to give deference to the department or agency interpretation. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). That is so because Congress is presumed to delegate to expert agencies, and not to the judiciary, the authority to reasonably define and apply less than precise statutory terminology, *id.* at 844, 865—unless the legislative history of a particular statute carries a specific intent. *Id.* at 842, 104 S.Ct. at 2781. FOIA, however, is an unusual statute; it applies to all government agencies, and thus no one executive branch entity is entrusted with its primary interpretation. Moreover, since the statute's purpose—disclosure of certain information held by the government—creates tension with the understandable reluctance of government agencies to part with that information, Congress intended that the primary interpretive responsibilities rest on the judiciary, whose institutional interests are not in conflict with that statutory purpose. *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 30 (1966), U.S. Code Cong. & Admin.News 1966, p. 2418 (court not "restricted to sanctioning agency discretion").

Many statutes other than FOIA bear upon the government's authority to disclose information to the public. In the absence of FOIA we would, pursuant to *Chevron*, defer to an agency's reasonable interpretation of such statutes. FOIA, however, directs federal agencies to comply with "any request for records," 5 U.S.C. § 552(a)(3) (1982), and by Exemption 3 excludes from its coverage only matters that are:

> *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular

criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3) (1982) (emphasis added).[4] Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated "specifically" with "explicitly." *Baldrige v. Shapiro*, 455 U.S. 345, 355, 102 S.Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). "[O]nly *explicit* nondisclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption." *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. We must find a congressional purpose to exempt matters from disclosure in the actual words of the statute (or at least in the legislative history of FOIA, *see CIA v. Sims*, 471 U.S. 159, 105 S.Ct. 1881, 1887 n. 11, 85 L.Ed.2d 173 (1985)) – not in the legislative history of the claimed withholding statute, nor in an

[4] The proviso was added to Exemption 3 in 1976, by the Government in the Sunshine Act, Pub.L. No. 94-409, § 5(b), 90 Stat. 1247 (1976). It was a result of congressional disatisfaction with the broad scope given the exemption by the Supreme Court in *FAA v. Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975), which held that a statute qualified under Exemption 3 because it directed the agency to withhold a wide variety of information whenever, in the judgment of the agency, release would adversely impact someone objecting to its release. See H.R.Rep. No. 1441, 94th Cong., 2d Sess. 25 (1976). *See also American Jewish Congress v. Kreps*, 574 F.2d 624, 627-28 (D.C.Cir. 1978).

agency's interpretation of the statute.[5] Quite apparently, Congress was well aware of modes of statutory interpretation that agencies and courts use to divine congressional intent – and wished, at least for the purpose of applying Exemption 3, to confine us essentially to the traditional plain meaning rule.

The government claims 28 U.S.C. § 534 qualifies as a withholding statute under Exemption 3. That statute reads in relevant part:

> (a) The Attorney General shall –
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> (1) acquire, collect, classify, and preserve identification, criminal identification, crime and other records;
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> . . . .
>
> (4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.
>
> (b) The exchange of records and information authorized by subsection (a)(4) of this section is *subject to cancellation*, if dissemination is made outside the receiving departments or related agencies.

28 U.S.C. § 534 (1982) (emphasis added.)[6] As seems obvious, subsection (a) does not specifically exempt from

[5] Nonetheless, it may be proper to give deference to an agency's interpretation of what matters are covered by a statute, once the court is satisfied that the statute is in fact an Exemption 3 withholding statute, *i.e.*, that it meets both the threshold test and one prong of the proviso. *See Church of Scientology of California v. IRS*, 792 F.2d 153, 167-70 (D.C.Cir.1986) (Silberman, J., concurring), *cert. granted*, __ U.S. __, 107 S.Ct. 947, 93 L.Ed.2d 996 (1987); *id.* at 162-63 n. 4.

[6] The origins of this statute trace back to 1924, when Congress first appropriated funds to the Department of Justice for "the acquisition, collection, classification, and preservation of criminal identification

public disclosure any matter. It only authorizes the Attorney General to collect information and exchange that information with other federal and state officials. The government's contention that subsection (b), which authorizes the Attorney General to stop exchanging information with a particular governmental entity *if that entity* discloses the information, brings the statute within Exemption 3 is unpersuasive. Subsection (b) does not speak to the Attorney General's authority to disclose or refuse to disclose to the public; only by implication does it even address the recipient agency's authority to disclose to the public.

In truth, the government's argument is based not on the statutory language, but rather on the legislative history of the statute. During debate on the House floor over the 1930 law that established the FBI's Identification Division, the sponsor of the bill explained that the criminal records would be kept by the Division "so as to be available any-

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records and their exchange with the officials of States, cities, and other institutions." Act of May 28, 1924, Pub.L. No. 68-153, title II, ch. 204, 43 Stat. 205, 217 (1924) (codified at 5 U.S.C. § 300 (1934)). Congress established the FBI's Identification Division six years later, in 1930, and vested it with the "duty of acquiring, collecting, classifying, and preserving criminal identification and other crime records and the exchanging of said criminal identification records with the duly authorized officials of governmental agencies, of States, cities, and penal institutions." Act of June 11, 1930, Pub.L. No. 71-337, ch. 455, 46 Stat. 554 (1930) (codified at 5 U.S.C. § 340 (1934)). The limitation now appearing in subsection (b) was added in 1957. Act of June 11, 1957, Pub.L. No. 85-49, title II, 71 Stat. 55, 61 (1957). Sections 300 and 340 were combined in 1966 and codified at 28 U.S.C. § 534. Act of September 6, 1966, Pub.L. No. 89-554, § 4(c), 80 Stat. 378, 616 (1966). The statute took its present form in 1982, with the addition of subsections (a)(1) and (2) regarding records to aid in the identification of deceased individuals and the location of missing persons. Missing Children Act, Pub.L. No. 97-292, § 2, 96 Stat. 1259 (1982).

where in the United States." 72 Cong.Rec. 1989 (1930) (statement of Rep. Graham). In 1957, then FBI Director Hoover expressed concern that as the law stood the FBI might lack authority to withhold records from local officials who used them "improperly," and Congress granted him the authority by adding the language now found in subsection (b). But Hoover, who appeared to specialize in questionable disclosures of information in FBI files,[7] surely would have been astonished to hear it contended that subsection (b) was directed at restricting the *FBI*'s direct authority or power to disclose information to the public.[8] In any event, as we have explained, legislative history will not avail if the language of the statute itself does not explicitly deal with public disclosure.

For similar reasons, we must reject the government's argument that the congressional response to a district court opinion of this circuit demonstrates that section 534 is an Exemption 3 statute. In *Menard v. Mitchell*, an in-

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[7] *See generally Intelligence Activities, Senate Resolution 21: Hearings Before the Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities*, 94th Cong., 1st Sess. (1975) (Vol. 6, Federal Bureau of Investigation).

[8] Hoover also stated: "I feel these records should be inviolate and they should not be used for political or personal gain of any kind. Certainly, if the time comes when any private individual or agency can obtain the fingerprint identification record of the FBI on any individual, irreparable harm will result." *Departments of State and Justice, the Judiciary, and Related Agencies Appropriations for 1958: Hearings Before the Subcomm. on Dep'ts of State and Justice and the Judiciary and related Agencies Appropriations of the House Comm. on Appropriations*, 85th Cong., 1st Sess. 223 (1957) (statement of J. Edgar Hoover, Director, FBI). It is clear from the context of his testimony, however, that Hoover did not ask Congress to *prohibit* the FBI from releasing rap sheets, but rather, sought only to *augment* FBI power over rap sheets. Hoover's seemingly pious words to the 1957 congressional committee are particularly ironic in light of revelations in subsequent years. *See supra* note 7.

dividual who had been arrested without probable cause by local authorities in California sought to prevent the FBI from disseminating information in its criminal identification files that had been forwarded to it regarding that arrest. The district court held that section 534 left the FBI "without authority to disseminate arrest records outside the Federal Government for employment, licensing or related purposes. . . ." *Menard v. Mitchell,* 328 F.Supp. 718, 727 (D.D.C.1971), *rev'd on other grounds sub nom. Menard v. Saxbe,* 498 F.2d 1017 (D.C.Cir.1974) (footnote omitted). Congress thereafter passed an appropriations act which explicitly gave the FBI the authority the district court had found lacking in section 534, and also passed acts apparently authorizing the Attorney General to release information from rap sheets to various establishments in the securities and commodities futures trading industries. *See supra* note 3. From these developments, the government argues that Congress necessarily understood section 534 as prohibiting release of rap sheets to any recipient not expressly authorized by the statute to receive them. We disagree. Section 534 by itself may not provide the Department authorization for release of rap sheets to the general public. But here Charles Medico's rap sheet is sought under the Freedom of Information Act, and that makes all the difference: the *Freedom of Information Act* is what authorizes (and requires) the Department of Justice to release rap sheets to any requester—unless, *inter alia,* section 534 brings rap sheets under the protection of Exemption 3 by explicitly exempting them from release. We simply do not find such an express exemption in section 534 and therefore hold section 534 is not an Exemption 3 withholding statute.[9]

[9] Even if section 534 met Exemption 3's threshold requirement ("specifically exempted from disclosure") it would not appear to satisfy either prong of the exemption's proviso. The first prong, subsection (A), "embraces only those statutes incorporating a congressional mandate of confidentiality that, however general, is 'absolute and without exception.' " *American Jewish Congress v. Kreps,* 574 F.2d 624, 629 (D.C.Cir.1978) (footnotes omitted), and "condones no decisionmaking at the agency level" on whether to release particular records to the public. *Founding Church of Scientology of Washington D.C., Inc. v. National Sec. Agency,* 610 F.2d 824, 827 (D.C.Cir. 1979). Section 534, however, is silent with respect to the general public. The most the statute could reasonably be said to *imply* is that since it gives the Department discretion, apparently unbounded, to withhold records from authorized government officials who disseminate the records to the public, it might also give the Department discretionary authority to withhold such records directly from the general public. That the government in fact treats any such restraint as discretionary can be seen from the Department's "wanted persons" regulation and policy on release of rap sheets to subjects of the rap sheets, *see supra* p. 733, as well as its actions during the course of this litigation, *see supra* p. 733.

Equally unpersuasive seems the government's alternative argument—that section 534 satisfies the second clause of the second prong of the proviso, subsection (B), because it "applies to a well-defined system of criminal history identification records." It is of course not enough that the statute refer to particular records: it must "refer[] to particular types of matters *to be withheld.*" 5 U.S.C. § 552(b)(3)(B) (1982) (emphasis added). The cases the government cites, *CIA v. Sims,* 105 S.Ct 1881 and *Irons & Sears v. Dann,* 606 F.2d 1215, are distinguishable because in each of those cases Congress expressly gave the agency discretion to withhold a category of records from the public. Here, there was no such express delegation of discretionary authority. Moreover, far from referring to a narrowly-defined category of records, section 534 appears limitless in scope: it covers "identification, criminal identification, crime and *other records,*" (subsection (a)(1)) (emphasis added), as well as "information which would assist in the identification of any deceased individual" and the "location of any missing person," (subsections (a)(2) and (3)). In fact, Department counsel was unable to tell us where the outer boundary of "other records" lies.

II.

The government argues in the alternative that, even if Exemption 3 does not apply, Charles Medico's rap sheet, as well as "non-financial crime" information on records other than rap sheets, are covered by the law enforcement records privacy exemption, Exemption 7(C). This provision exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." Freedom of Information Reform Act of 1986, Pub.L. No. 99-570, § 1802 (Oct. 27, 1986) (amending 5 U.S.C. § 552(b)(7)(C)). Reporters and Schakne, on the other hand, argue that the records should be examined under Exemption 6, covering "personnel and medical files and similar files the disclosure of which would constitute a *clearly* unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6) (1982) (emphasis added), because in their view the government has failed to make the showing necessary to meet the Exemption 7 threshold.[10] As is evident from the language of the exemptions, Congress intended that it be easier for an agency to show that a record is exempt under the privacy test of 7(C) (once the agency has established that

[10] Prior to the 1986 amendment of FOIA, this court held that to meet the threshold requirement for Exemption 7 a criminal law enforcement agency "must establish that its investigatory activities are realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached. Either of these concerns must have some plausible basis and have a rational connection to the object of the agency's investigation." *Pratt v. Webster*, 673 F.2d 408, 421 (D.C.Cir.1982). The 1986 amendment altered the threshold requirements for Exemption 7 by deleting reference to "investigatory records" and replacing it with "records or information."

the record meets the Exemption 7 threshold) than for the agency to satisfy the privacy test of Exemption 6. Although the district court found the records Reporters and Schakne seek were acquired by the Department for law enforcement purposes and therefore meet the Exemption 7 threshold, we need not resolve that issue because, assuming *arguendo* that the district court was correct, we conclude the Department has failed to establish that release of the records "could reasonably be expected to constitute an unwarranted invasion of personal privacy," which of course means the Department has not made the more difficult showing required by Exemption 6 either.

We have held that the phrase "unwarranted invasion of personal privacy" requires a balancing of the "privacy interest" against the "public interest in disclosure." *Common Cause v. National Archives and Records Serv.*, 628 F.2d 179, 182 (D.C.Cir.1980) (quoting *Getman v. NLRB*, 450 F.2d 670 (D.C.Cir.1971)). *See also Lesar v. Department of Justice*, 636 F.2d 472, 486 (D.C.Cir.1980); *Fund for Constitutional Gov't v. National Archives and Records Serv.*, 656 F.2d 856, 862 (D.C.Cir.1981). The 1986 amendment to FOIA, which substituted "could reasonably be expected to" for "would" in Exemption 7(C), relieves the agency of the burden of proving to a certainty that release will lead to an unwarranted invasion of personal privacy, but does not otherwise alter the test. *See* 132 Cong.Rec. S14,296 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy referring to S.Rep. No. 221, 98th Cong., 1st Sess. 24-25 (1983)); 132 Cong.Rec. H9462 (daily ed. Oct. 8, 1986) (statement of Rep. English); 132 Cong.Rec. S16,496 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy). That balancing is to be done by the district court "de novo," 5 U.S.C. § 552(a)(4)(B), *see Department of the Air Force v. Rose*, 425 U.S. 352, 380, 96 S.Ct. 1592, 1608, 48 L.Ed.2d 11 (1976), and we give deference to the district court to the

extent the court does not "misapprehend the law or overlook a crucial policy concern." *International Bhd. of Elec. Workers, Local 41 v. Department of Housing and Urban Dev.*, 763 F.2d 435 (D.C.Cir.1985) (an Exemption 6 case).

The district court determined that any non-financial crime information on the requested records regarding Charles Medico is "personal" to him, meaning presumably that he has a privacy interest in it. Further, the court concluded that "it seems highly unlikely" that such information has any public interest, or relevance to the purpose behind Reporters' and Schakne's request – because the offenses (if any) were "minor" and occurred over thirty years ago. Reporters and Schakne argue that the district court (1) failed to consider that any privacy interest in the information sought was "sharply attenuated" by the fact that the information was "already available in the official record," and (2) undervalued the public interest that might be served by release of the records.

A. *Privacy Interest*

This case raises the novel question whether, and to what extent, "personal privacy" would be invaded by the Department of Justice's release of arrest, indictment, conviction and imprisonment records that are made available by municipal, state or federal agencies to any member of the general public. If there is no privacy interest at all in such records, then, of course, no privacy is invaded. The ordinary meaning of privacy suggests that Exemption 7(C) does not exempt records consisting of information that is publically [*sic*] available. The first definition for "private" in Webster's Third New International Dictionary is: "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." What is encompassed by the "personal privacy"

language of FOIA is, of course, a question of legislative intent, but there is no suggestion in the legislative history of Exemption 7(C) that "privacy" as used in the exemption has other than its ordinary meaning. Congressional debate over the 1986 amendment to Exemption 7(C) merely repeated the words of the statute: "personal privacy." *See, e.g.*, 132 Cong.Rec. S16,496 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy). In opposing Exemption 7(C) in 1974 as overly narrow, Senator Hruska argued on the senate floor that "the release of any material [from FBI files] into the public domain is likely to cause embarassment to individuals mentioned in FBI files." 120 Cong.Rec. 17,036 (1974). That at least suggests that the exemption was directed at (although in the senator's view did not adequately protect against) unwarranted release of information *not yet in* the public domain. This interpretation finds support in the 1965 Senate Report on Exemption 6,[11] which explained that "[t]he phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's *private affairs* from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added). The

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[11] It is appropriate to look to Exemption 6 in interpreting Exemption 7(C) because the sponsor of the amendment that led to the original Exemption 7(C) in 1974 explained on the senate floor, "By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh." 120 Cong.Rec. 17,033 (1974) (statement of Sen. Hart). Although the proposal was subsequently altered by deletion of the word "clearly" in response to concerns expressed by President Ford, *see* 120 Cong.Rec. 33,158-59, 34,162-63 (1974), and Exemption 7(C) was amended in 1986, *see supra* p. 738, the underlying similarity between the two exemptions remains.

term "private affairs" would not seem to cover information that is legally available to the public at large.

To be sure, this court has recognized an Exemption 7(C) privacy interest in names of subjects of an FBI investigation even though the names had already been widely publicized in the media. We held that such publicity "in no way undermines the privacy interests of these individuals in avoiding harassment and annoyance that could result should the FBI *confirm* . . . the presence of their names in the . . . documents." *Weisberg v. Department of Justice*, 745 F.2d 1476, 1491 (D.C.Cir. 1984). The crucial difference between *Weisberg* and this case, however, is that the records in *Weisberg* related to a confidential investigation, whereas Reporters and Schakne seek records that local, state or federal political bodies have decided should be available to the public.

The government claims, nevertheless, that the same principle should apply to this type of case because it is a great deal more difficult "as a practical matter" for a requester to obtain the same public record information from the primary sources than it is to simply obtain it from the FBI's efficient record system. The requester may, we recognize, not even be aware in a given case which jurisdictions hold the records sought or indeed whether or not records exist. The subject, therefore, in the government's view, has a concern in maintaining difficulty of access to his public records. That may well be so, but it is not apparent to us how that concern equates to a "privacy" interest within the meaning of the statute, or how it would be measured. At oral argument government counsel contended that if the release of records causes any embarrassment or harm to a subject's reputation, then such release necessarily results in an "invasion of personal privacy." The privacy interest, in the government's view, is congruent with the degree of embarrassment the release of

records would cause. That argument, it seems to us, proves too much. Virtually any unflattering information, even already well-distributed in the public domain, may cause further embarrassment when reintroduced. The government's position, we concede, is attractive as a legislative policy matter. We all cherish the notion that our past mistakes will be forgotten, and most of us—particularly lawyers and judges—share a distaste for the widespread publication of such information as arrest records that will surely harm some innocent targets. But we cannot find in the FOIA or its legislative history any support for the government's expansive interpretation of privacy.[12]

Two Supreme Court decisions touch tangentially on the issue we face. In *Department of State v. Washington Post Co.*, the Court said in dicta that where information is "a matter of public record," for example, "past criminal convictions," "[t]he public nature of [the] information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a 'clearly unwarranted invasion of personal privacy [under Exemption 6] . . .," 456 U.S. 595, 602-03 n. 5, 102 S.Ct. 1957, 1961-62 n. 5, 72 L.Ed.2d 358 (1982). This seems to imply the existence of a low-level privacy interest in criminal records *despite* their public availability

[12] The 1966 House Report on FOIA states, "The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R.Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), U.S.Code Cong. & Admin.News 1966, p. 2428. This sentence of course would not exempt *all* records "the disclosure of which might harm the individual." We believe it is similarly unsupportive of the proposition that *all* releases of records that harm an individual invade a privacy interest.

somewhere in the nation. And this proposition finds some further support in *Cox Broadcasting Corp. v. Cohn*, a case resting on the intersection between the common law of privacy and the First Amendment. There, a newspaper had publisned the name of a victim of a crime which it had obtained from a judicial record open to public inspection, and the Court stated, "[T]he prevailing law of invasion of privacy generally recognizes that the interests in privacy *fade* when the information involved already appears on the public record." 420 U.S. 469, 494-95, 95 S.Ct. 1029, 1045-46, 43 L.Ed.2d 328 (1975) (emphasis added). Thus, *Department of State* and *Cox Broadcasting* suggest that the initial step in an Exemption 7(C) analysis should be to determine whether the requested information is a matter of public record. If the information is truly on the public record, then the privacy interest, while not eliminated, is weakened considerably, and the privacy interest/public interest balance affected accordingly.

The phrase "public record" implies, we believe, a good deal more than that the information be available. It means that a local, state or federal political body has made an affirmative determination that criminal records must be freely available to the general public and has provided a mechanism to ensure the implementation of that policy. If a local law enforcement official provides criminal information episodically, or to only certain requesters, that, in our view, would be inadequate to cause the privacy interest in those criminal records to fade significantly. That situation comes close to *Weisberg*. Of course it also follows that if criminal records are expunged by the primary source they can no longer be regarded as public. But if, for example, a state legislature requires arrests and convictions to be recorded and made freely available to the general public, any privacy interest in those records seems insignificant. Since the district court did not consider

whether Charles Medico's criminal records, if any, are publicly available in the sense we have discussed, it "misapprehend[ed] the law," *International Bhd. of Elec. Workers*, 763 F.2d at 435; it did not focus on what the Supreme Court referred to as the "fade[d]" nature of this kind of privacy interest.

B. *Public Interest in Disclosure*

The public interest in disclosure arises from the public's "right to governmental information." S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R.Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), U.S.Code Cong. & Admin.News 1966, p. 2428. Its measure is "the public benefit gained from making information freely available." *Board of Trade of the City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d at 398. As we noted, the district court regarded Department of Justice records (other than rap sheets) containing "non-financial crime" information on Charles Medico to be of little or no public interest, and declined to find the public interest enhanced by the purpose of the request or status of the requesters. Extending our analysis to cover rap sheets, we must decide whether this determination "misapprehends the law." *International Bhd. of Elec. Workers*, 763 F.2d at 435. We observe at the outset the awkwardness of the federal judiciary appraising the public interest in the release of government records. Normally an administrative agency would make a decision of that sort in the first instance, and a court would review it only for reasonableness. Our difficulty arises out of the dilemma Congress faced: as we discussed above, because agencies have a strong interest in preserving the secrecy of their own records and are naturally disposed to resist certain disclosures, Congress decided that the judiciary should review the propriety of an agency's withholding *de novo*, 5 U.S.C. § 552(a)(4)(B) (1982).

Reporters and Schakne ask only for records, if they exist, composed of information that local, state and federal political bodies decided to make public. We note, as did the Supreme Court, that "[b]y placing the information in the public domain . . . the State must be presumed to have concluded that the public interest was thereby being served." *Cox Broadcasting*, 420 U.S. at 495, 95 S.Ct. at 1046. Yet the district court, after an *in camera* review, found the public interest in such records to be insignificant – because the records sought presumably relate to crimes or possible crimes that were "minor," and because the events occurred some years ago. We, however, believe the district court should first have looked to state determinations of the "public interest." If the records contain entries drawn from state public records of the kind we have discussed, it would seem anomalous and indeed unseemly for a federal judge to, in effect, overrule a state political body's determination that publication *is* in the public interest.[13] We see no principled basis by which a court can determine that a crime is so "minor" that information regarding it, which a state considered significant enough to place on the public record, is in reality of little public interest.[14] Nor can we say that an older public record has lost its public interest – old records may have historical importance. To be sure, as newspaper readers we might opine that one story is more *interesting* than

[13] Our concurring colleague apparently regards this kind of deference to the political determinations of mere state legislatures as *lèse majesté*. We, on the other hand, are less confident of our ability as judges to so precisely perceive the public interest.

[14] With all respect to our concurring colleague, this is not a case about traffic tickets. *But see* Concurring Opinion at 5. And even if we felt competent to label the recorded offenses as of little public interest, which we do not, we would also likely recognize that any privacy interest in such information would be equally inappreciable.

another, or even more politically significant. But surely Congress could not have intended federal judges to make such idosyncratic determinations. Indeed, had Congress done so, the task thus entrusted to the federal judiciary might arguably exceed Article III limitations. *See Keller v. Potomac Electric Co.*, 261 U.S. 428, 440-44, 43 S.Ct. 445, 447-49, 67 L.Ed. 731 (1923). *See also Illinois v. United States*, 460 U.S. 1001, 1004-06, 103 S.Ct. 1240, 1242-43, 75 L.Ed.2d 472 (1983) (Rehnquist, J., dissenting). It follows then that we should seek objective indications of the public interest against which to balance whatever privacy interests are at stake. We conclude, therefore, that when political bodies have determined the records at issue do have a continuing public interest, the federal judiciary is not in a position to dispute or minimize that determination.[15]

Reporters and Schakne argue that the public interest is enhanced because the records are sought by representatives of the news media, for the purpose of aiding their private investigation of an allegedly corrupt U.S. congressman. Charles Medico, we are told, worked for a company that received federal funds via dealings with this congressman, and thus Charles Medico's criminal records might provide clues for the investigation. The court, however, cannot inquire into the occupation of the requester when determining whether a record is exempt under FOIA. The statute indicates on its face that information is to be made available equally to all, by stating

[15] Congress could of course decide the public ought not have access to federal compilations of public criminal records. Congress has considered such a possibility in the past, and might do so again. *See, e.g., Dissemination of Criminal Justice Information: Hearings on H.R. 188, H.R. 9783, H.R. 12574, and H.R. 12575 Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1973).

that agencies shall make records available "to any person." 5 U.S.C. § 552(a)(3) (1982). *See Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 n. 14 (D.C.Cir.1970); *Sterling Drug Inc. v. Federal Trade Comm'n*, 450 F.2d 698, 704 n. 4 (D.C.Cir.1971). The legislative history of FOIA confirms that Congress' intention was to "eliminate[] the test of who shall have the right to different information." S.Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). "[T]he Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975). FOIA thus "precludes consideration of the interests of the party seeking relief," *Soucie v. David*, 448 F.2d 1067, 1077 (D.C.Cir.1971), and "[t]he focus is not on the applicant but on an abstract person. . . ." *Sterling Drug*, 450 F.2d at 704 n. 4. "Congress granted the scholar and the scoundrel equal rights of access to agency records." *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C.Cir.1986). *Cf. National Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C.Cir.1987) ("legislative history of [FOIA] *fee waiver* provision indicates special solicitude for journalists" (emphasis added)); Freedom of Information Reform Act of 1986, Pub.L. No. 99-570, § 1803 (Oct. 27, 1986) (to be codified at 5 U.S.C. § 552(a)(4)(A)(ii)(II)).

For similar reasons, the court should not attempt to determine the public interest in release of criminal records based on the specific purpose of the request. Certainly the requesters' goal in this case, exposing "the potential abuse of government funds," is of public interest—but the difficulty is that the public interest does not stop there. We *as judges* are unable to distinguish between the public interest in different criminal records based on the specific intent

behind the request, or, for that matter, normally, the identity of the subject of the criminal record.[16] This circuit did follow a different approach in *Getman v. NLRB*, an Exemption 6 case in which NLRB records were sought by university professors to aid their study of the agency. The court evaluated the public interest by weighing the purpose of the study and even the quality of the study itself. 450 F.2d 670, 675 (D.C.Cir.1971). *See also Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C.Cir.1974). But the Supreme Court in *FBI v. Abramson* rejected the *Getman* approach,[17] stating flatly, "Congress did not differentiate between the purposes for which information was requested." 456 U.S. 615, 631 102 S.Ct. 2054, 2064, 72 L.Ed.2d 376 (1982).[18] If a record must be released under FOIA when requested by a news reporter for the purpose of publication, it must be released upon request of an ordinary citizen. Thus, Reporters' and Schakne's precise journalistic purpose in seeking the records is irrelevant to a determintion of the public interest under Exemption 7(C). *Cf. Griffin*, at 649 ("furnishing

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[16] In *Stern v. FBI*, this court did distinguish between the public interest in the identity of a high-level FBI employee who knowingly obstructed justice and that of low-level FBI employees who only inadvertently contributed to the wrongdoing. *Stern v. FBI*, 737 F.2d 84, 93-94 (D.C.Cir.1984). We are of course bound by *Stern*, but do not believe its holding governs this case.

[17] To be sure, *Abramson* was an Exemption 7 case, and *Getman* Exemption 6. But *Abramson* relied on *Sears* for this proposition—and *Sears* is an Exemption 5 case. Thus the Court in *Abramson* appeared to refer to the FOIA as a whole, not just Exemption 7. In any event, see supra note 11.

[18] The concurring opinion apparently believes the Supreme Court's language overly broad. *See* Concurring Opinion at 745. We take the Court to disapprove of the very kind of ad hoc "judicial weighing of the benefits and evils of disclosure" reflected in some past opinions of this court on which our colleague relies. *Abramson*, 456 U.S. at 631, 102 S.Ct. at 2064.

journalists with information will *primarily* benefit the general public" (emphasis added)). And, therefore, the district court also was in error because it based its determination of the public interest partly on a finding that the records sought "are completely unrelated to anything now under consideration by the plaintiffs." Indeed, this approach would seem to place the district court in a role somewhat akin to that of an editor. Reporters and Schakne revealed the focus of their investigation, and the court declared the information sought was irrelevant—in effect deciding what was or was not important to their story. Rather, the district court should have determined only the interest of the general public in release of the records themselves.

* * * * *

We therefore remand this case to the district court to make a determination as to whether the Department of Justice holds criminal record information that, in accordance with our opinion, must be disclosed. Since appellants would be entitled only to information on Charles Medico that is a matter of public record, the Department would of course not be obliged to disclose any other information if exempt under 7(C). If it is for any reason unclear as to whether information held by the Department is publicly available at the original source, the district court should consider whether the Department might satisfy its obligation under FOIA, if it so proposes, by merely referring appellants to the law enforcement agency that provided the information to the Department.[19]

It is so ordered.

[19] Reporters and Schakne have asked for an award of litigation costs and attorneys fees pursuant to 5 U.S.C. § 552(a)(4)(E) (1982). On remand, the district court should determine whether plaintiffs have "substantially prevailed," and if so, whether an award "is necessary to implement the FOIA." *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C.Cir.1977). *See also Weisberg*, 745 F.2d at 1498.

STARR, Circuit Judge, concurring in the judgment and concurring in part:

I concur in the judgment to remand to the District Court for its reassessment of the privacy interest-public interest balance. I also concur in all of the court's opinion save for section II B. For the reasons that follow, I believe the public-interest analysis contained in that section is flawed.[1] Specifically, I find the majority's approach to collapse improperly a Congressionally-mandated balancing process into a single-factor test; in the process of this curious metamorphosis, the majority has, with all respect, ignored a number of factors that should figure into a proper assessment of the public interest.

The dominant objective of FOIA is, of course, disclosure, as the court rightly recognizes. *See* Opinion at 734. But Congress has also determined that under certain circumstances the public's right of access should yield to legitimate privacy interests. Exemption 7(C) sets forth one such circumstance. As recently amended by the Freedom

[1] Were we writing on a blank slate, I would also conclude that, by virtue of the care and rigor with which Attorney General Bell and other high ranking officials of the Department analyzed section 534, *Chevron*-style deference would be appropriate so as to trigger Exemption 3. Indeed, the principle of judicial deference to reasonable administrative interpretations of ambiguous statutes is particularly forceful where, as here, that interpretation has been rendered by the head of the Executive Branch Department charged with the statute's application after a careful and painstaking deliberative process. *Cf. Church of Scientology v. IRS*, 792 F.2d 153, 164 (D.C.Cir.1986) (Silberman, J., concurring), *cert. granted*, _ U.S. _, 107 S.Ct. 947, 93 L.Ed.2d 996 (1987). But at this point, too much water is over the dam in the way of FOIA caselaw to examine what should be an interplay between the clear strictures of *Chevron* and the exacting demands of FOIA decisional law.

of Information Reform Act of 1986, Exemption 7(C) shields from disclosure

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(C) (codification of Pub.L. No. 99-570, § 1802 (Oct. 27, 1986)). There can be no doubt that on its face the FOIA request here seeks "law enforcement records or information." *See* J.A. at 14 (original FOIA request).

Unlike many of the other FOIA Exemptions, literal compliance with the terms of Exemption 7(C)—that is, a finding that the requested information was "compiled for law enforcement purposes"—leads not to automatic withholding but rather triggers a balancing process. *See Lesar v. Department of Justice*, 636 F.2d 472, 486 n. 80 (D.C.Cir.1980); *cf.* 2 J. O'Reilly, *Federal Information Disclosure* § 16.07, at 16-19 (1985) (discusssing this aspect of analogous Exemption 6). This balancing process is suggested by the language of Exemption 7(C); the choice of the term "unwarranted," which connotes balancing, indicates that Congress impliedly directed such an approach. This assumption is confirmed by the legislative history. As the Supreme Court has noted, "[b]oth [the] House and Senate Reports can only be read as disclosing a congressional purpose . . . to require a balancing of interests." *Department of the Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11 (1976).[2] Moreover,

[2] *Rose* was, of course, an Exemption 6 case. Nonetheless, its teaching in this respect applies fully to the Exemption 7 setting. As Judge Wilkey aptly put it in speaking for the court in *Lesar v. Department of Justice*, 636 F.2d 472, 486 n. 80 (D.C.Cir.1980), an Exemption 7(C) case, "Exemption 7(C) and Exemption 6 run contrary to the theory of other exemptions. Here the court is called upon to balance the conflicting interests and values involved; in other exemptions Congress has struck the balance and the duty of the court is limited to finding whether the material is within the confined category." *See also* maj. op. at 738 n. 11, 742 n. 17.

this balancing is to be conducted by the courts *de novo*. 5 U.S.C § 552(a)(4)(B); *see Lesar*, 636 F.2d at 486; *cf. Rose*, 425 U.S. at 379, 96 S.Ct. at 1607 (Exemption 6).

Thus, it is hardly surprising that a balancing requirement is firmly embedded in the law of this circuit. In *Baez v. Department of Justice*, 647 F.2d 1328 (D.C.Cir.1980), for example, we heid that to assess properly an Exemption 7(C) claim—that is, to determine whether disclosure would lead to "an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C)—we "must balance the privacy interest involved against the public interest in disclosure." 647 F.2d at 1338. The *Baez* court, speaking through Judge Wilkey, then proceeded to strike the balance in favor of privacy interests, discerning in that case "no identifiable public interest in the[] materials." *Id.* at 1338-39. But the court reached this conclusion only after examining "the other side of the balance," namely the public interest in disclosure. *Id.* at 1338; *see also Common Cause v. National Archives and Records Service*, 628 F.2d 179, 182 (D.C.Cir.1980); *Lesar*, 636 F.2d at 486.

The court acknowledges and purports to follow this balancing requirement, even citing some of these same cases. *See* maj. op. at 737. In reality, however, the majority collapses the entire balancing process into a single determination, namely whether a federal or state political body determined at some time that the requested information should be "public." *See* maj. op. at 740-41. I recognize this determination properly impacts both sides of the Exemp-

tion 7(C) balance, and I agree fully with the manner in which the court has incorporated this factor into its privacy-interest analysis. *See* maj. op. at 738-40. But the majority has fallen into error by making this *identical* determination the *sole* feature of its public-interest inquiry. I respectfully disagree with that ap roach.

The majority reveals at the outset what animates its search for an easy-to-apply, single-factor test, namely, "the awkwardness of the federal judiciary appraising the public interest in the release of government records." Maj. op. at 740. This concern sends the majority on a quest for someone to defer to, maj. op. at 738-39; and leads directly to the development of a deference-based public-interest analysis—that is, if the requested material is "information that local, state and federal political bodies decided to make public," *id.* at 740, then a significant public interest in the material exists.

While I share the majority's concern that the judiciary is ill-equipped to make value-laden judgment calls such as assessing the extent of the "public interest," I am nonetheless persuaded that Congress has, in essence, put us in the business of doing just that. It is, after all, Congress that has directed the courts to engage in *de novo* balancing. *See* 5 U.S.C. § 552(a)(4)(B). Indeed, the majority concedes as much by noting after its reference to the awkwardness of the judiciary's role that "Congress decided that the judiciary must review the propriety of withholding *de novo*." Maj. op. at 740.

Thus, our duty is clear. Yet, the majority decides to go AWOL, as it were, by failing entirely to heed Congress' directive. Instead of *de novo* balancing, the court's "analysis" is reduced to deferential rubber-stamping. I have no doubt that the determinations of federal or state political bodies as to the "public" nature of information

should play a role, perhaps even a large role, in a proper public-interest analysis. But I am unable to conclude, as my colleagues do, that this single factor should constitute the *whole* of the analysis. The generalized policy determination that a category of materials warrants disclosure does not mean that a "public interest" within the meaning of FOIA attaches to every scrap of paper falling within that category.

In the process of championing a transformation of a two-sided balancing process into a single-factor test, the court rejects consideration of several factors that should figure in a determination of the "general public interest. *See* maj. op. at 742 (noting that the District Court should determine "the interest of the general public in release of the records themselves"). In the circumstances of this case, for example, it seems powerfully relevant that the offenses reflected on the requested records are minor and occurred a long time ago. A traffic ticket, let us say, scarcely partakes of the nature of an arrest, hypothetically, for murder.

So too, the specific purpose of the request should be relevant. In the context of this case, the fact that the records are sought by representatives of the media for the avowed purpose of exposing the possible misuse of government funds—rather than by some idiosyncratic individual seeking to satisfy a mere curiosity about criminal records—should be a factor in the public-interest determination. As the court candidly notes, this is exactly the approach this circuit followed in *Getman v. NLRB*, 450 F.2d 670, 675 (D.C.Cir.1971), and other cases. *See* Opinion at 742 (citing *Getman* and *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C.Cir.1974)); *see also Fund for Constitutional Government v. National Archives*, 656 F.2d 856, 866 (D.C.Cir.1981) (examining purpose for request, finding a "general public curiosity" to be insufficient).

The court, however, declines to follow these precedents, explaining its refusal by pointing to *FBI v. Abramson*, 456 U.S. 615, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982): "[T]he Supreme Court in *FBI v. Abramson* rejected the *Getman* approach." Opinion at 742. With all respect, I can discern no such rejection in my reading of *Abramson*.

The majority's analysis of *Abramson* is grounded upon that opinion's statement that "Congress did not differentiate between the purposes for which information was requested." 456 U.S. at 631, 102 S.Ct. at 2064. While on its face, this statement indeed appears to reject *Getman's* approach, the context of the statement makes clear that the Court's point was quite different.[3] Specifically, the *Abramson* Court was rejecting a claim that "Congress' undeniable concern with possible misuse of governmental information for partisan political activity is the equivalent

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[3] *Abramson* involved a FOIA request for documents sent by the FBI to the White House in 1969. The documents were prepared at White House request, rather than compiled for law enforcement purposes, but it was undisputed that the information reported in the documents "was originally compiled for law enforcement purposes." 456 U.S. at 623, 102 S.Ct. at 2060. It was similarly undisputed that "disclosure of [the] information would be an unwarranted invasion of privacy." *Id.* Thus, the only question facing the Court was whether material admittedly properly within Exemption 7(C) lost its exempt status when it was incorporated into a document that did not meet the Exemption 7 threshold requirement, namely, that it was not compiled for law enforcement purposes. The *Abramson* Court itself seemed to recognize it was facing a narrow issue: "The sole question for decision is whether information originally compiled for law enforcement purposes loses its Exemption 7 protection if summarized in a new document not created for law enforcement purposes." *Id.* Moreover, the language relied upon by the majority is contained in a single paragraph in a section devoted to disposing of "several other arguments," *id.* at 629, 102 S.Ct. at 2063, after the basic legal issue in the case had been discussed. *See id.* at 623-29, 102 S.Ct. at 2060-63.

of a mandate to release any information which might document such activity." *Id.* As the Court made even more clear later in the solitary paragraph of relevance to our discussion, the contention it faced in *Abramson* was that *despite* the concession that an unwarranted invasion of privacy would result from disclosure, *see id.* at 623, 102 S.Ct. at 2060, Exemption 7 should not apply due to the purpose of the request. The Court disagreed, concluding as follows:

> [T]he Act require[s] assessment of the harm produced by disclosure of certain types of information. Once it is established that information was compiled pursuant to a legitimate law enforcement investigation and that disclosure of such information would lead to one of the listed harms, the information is exempt. Congress thus created a scheme of categorical exclusion; it did not invite judicial weighing of the benefits and evils of disclosure on a case-by-case basis.

Id. at 631, 102 S.Ct. at 2064 (footnote omitted). Obviously, the Court was considering a later phase of the inquiry under Exemption 7, *after* the "harms" determination (resulting from the balancing process) had been made. *See* 456 U.S. at 623, 102 S.Ct. at 2060 (reporting that all parties agreed that "the disclosure of such information would be an unwarranted invasion of privacy"). At that stage—i.e., after the "harms" portion of the Exemption 7 analysis has been completed—the purpose of the FOIA requester is no longer legally relevant; for if one of the enumerated harms is present, then the exemption from mandatory disclosure is established. At that late stage, in short, there is to be no further judicial weighing of competing interests.

But the *Abramson* Court was by no means purporting to ban "judicial weighing" to determine whether one of the

listed harms is present in the first instance. One of the "listed harms" to which the Court alluded is, of course, "an unwarranted invasion of privacy." *See* 5 U.S.C. § 552(b)(7)(C). As we have seen, to assess this "harm," Congress has mandated that the courts engage in *de novo* balancing. Thus, *Abramson*'s general statement has no bearing on what factors may be relevant to the "unwarranted invasion" determination and the public-interest assessment subsumed under that determination. Accordingly, the purpose of the request, in my view, should figure into a proper Exemption 7(C) balancing.

In sum, the majority's public-interest analysis is but a rehashing of its privacy analysis; the two determinations, required by Congress to comprise opposite sides of a *de novo* balancing process, have been collapsed into a single factor. Consistent with Congress' balancing requirement, this circuit has until today engaged in a fairly detailed assessment of the public interest, carefully calibrating the level of that interest depending on factors such as the precise information sought, *see, e.g., Stern v. FBI*, 737 F.2d 84, 93-94 (D.C.Cir.1984) (differentiating between level of public interest due to relative rank of FBI officials), and the purpose of the request, *see, e.g., Fund for Constitutional Government*, 656 F.2d at 866 ("general public curiosity" insufficient). Viewed against the backdrop of these circuit precedents, not to mention Congress' *de novo* balancing requirement, the court's deferential, hands-off approach is difficult to justify in law. Because I believe the federal courts are duty-bound, for better of worse, to perform the task Congress has assigned us, I cannot join in section II B of the court's opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6020

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

No. 85-6144

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 79-03308)

On Appellees' Petition for Rehearing

Filed October 23, 1987

Before: STARR and SILBERMAN, Circuit Judges, and McGOWAN, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Dissenting opinion filed by Circuit Judge STARR.

SILBERMAN, Circuit Judge: The Department of Justice, supported by an amicus curiae brief filed by SEARCH Group, Inc., has petitioned for rehearing. The government argues, *inter alia*, that the panel opinion misinterpreted the term "public interest," as used in the balancing of interests in Exemptions 6 and 7(C) of the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552 (b)(6), (7)(C) (1982). The charge is that the panel incorrectly deferred to state or local government determinations that arrest or conviction records should be publicly available. Although we deny the petition for rehearing and reaffirm our prior judgment, we think the government has a valid point and therefore modify our rationale.

I.

Our opinion rejected the district court's reasoning – that there was little or no public interest in Charles Medico's rap sheet because the records sought related to minor crimes that occurred long ago. *Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 740-42 (D.C. Cir. 1987). We concluded that there was no principled statutory basis to support that determination, and we said that the district court should have deferred to state or local determinations that publication of arrest or conviction records were in the public interest. *Id.* at 740-41. It is argued in the petition for rehearing, however, that such an approach could prove confusing and indeed unworkable since the district court may well encounter conflicting policies on disclosure of arrest records at the state and local level. SEARCH Group, an association of governors' appointees responsible for the operation of the agencies in their states that collect and

maintain criminal history records, has brought to this court's attention the fact that many states have policies or laws that forbid the release of their own compiled law enforcement information, which includes rap sheets. Based in part on the amicus' presentation, we now agree that our prior position on this point should be abandoned. We must thus confront two questions that we previously thought appropriate to avoid: How do we determine, as a matter of law, the public interest in disclosure of the information that appellants seek? Does FOIA require the judiciary to make an individual determination of the general public interest in information sought in every case in which a section 6 or 7(C) Exemption is asserted? *Id.* at 740-42. In answering these questions, we find no standards or guidelines drawn from the statute to inform our determination. Prior cases of this circuit have purported to appraise and value the public interest in specific information sought,[1] but in no case has this court ever articulated standards or a rationale for that process.

The government argues that the statute has a "core" purpose, *i.e.*, "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). And although the statute reaches beyond the core, the government argues, the courts should treat disclosure that serves core policies more favorably than those disclosures that do not. Over a decade ago,

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[1] See *Stern v. FBI*, 737 F.2d 84, 92 (D.C.Cir. 1984); *Baez v. United States Dep't of Justice*, 647 F.2d 1328, 1338-39 (D.C. Cir. 1980); *Rural Housing Alliance v. United States Dep't of Agric.*, 498 F.2d 73, 77-78 (D.C. Cir. 1974); *Getman v. NLRB*, 450 F.2d 670, 675-76 (D.C. Cir. 1971).

Judge Leventhal, speaking for this court, expressed doubt that the public interest considerations of the Act could be so limited. *Ditlow v. Shultz,* 517 F.2d 166, 172 & n.24 (D.C. Cir. 1975). It seems to us that he was quite correct. A core purpose does not, in our view, confer judicial power to predict whether particular information the government holds will, upon disclosure, aid an "informed citizenry" as to democratic political choices. Indeed, the government is utterly incapable of explaining to us why the information sought here does not serve the Act's "core" policy. The government and the panel concurring opinion argue that any convictions involved here are too old to require disclosure. *Reporters Comm.,* 816 F.2d at 745, but from what principle does that observation flow? Surely it cannot be seriously argued that as a matter of law an "informed citizenry" should have available to it arrest records two years old but not five or ten. The subjects of appellants' requests are alleged to have had dealings with government officials; it is surely up to the citizenry, once informed, to determine the relevance of the age of the arrests or convictions.

Even if we could fashion a methodology – and we firmly believe we cannot – to grade the public interest in government-held information in the abstract, we must keep in mind that we are unable to foresee or monitor how the information will eventually be used. *Ditlow,* 517 F.2d at 171 & n.18. As we have held, information disclosed to anyone must be disclosed to everyone. *Durns v. Bureau of Prisons,* 804 F.2d 701, 706 (D.C. Cir. 1986); *Ditlow,* 517 F.2d at 171 & n.18. Therefore, a particular requester's purpose in seeking information, or his proposed use, must be wholly irrelevant to a determination of the public interest since we cannot predict how other persons, including those

to whom the requester might give the information, would use it.[2]

But, it might be asked, if it is impossible to judge the public interest in requested information by its proposed use or its inherent value to an informed citizenry, how then can it be judged at all? We do not think it can. We do not believe that the phrase "public interest," as used in the balancing in Exemptions 6 and 7(C) of the Act, means anything more or less than the general disclosure policies of the statute.[3] Since Congress gave us no standards against which to judge the public interest in disclosure, we do not believe Congress intended the federal judiciary – when applying only Exemptions 6 and 7(C) of the Act – to

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[2] The use test, best exemplified by *Getman,* was rejected in this circuit in *Washington Post Co. v. United States Dep't of Health & Human Services,* 690 F.2d 252, 258 & n.17 (D.C. Cir. 1982) ("the particular need of the requester is irrelevant under FOIA"); *see also FBI v. Abramson,* 456 U.S. 615, 631 (1982) ("Congress did not differentiate between the purposes for which information was requested").

[3] Judge Leventhal noted that some have thought there to be a difference between the House and Senate Reports preceding passage of the Act as to the meaning of public interest. *Ditlow,* 517 F.2d at 171 n.19. The latter has been interpreted to support the notion of a public interest of varying weight. *See Getman,* 450 F.2d at 675-77. But Judge Leventhal, correctly we think, disapproved of the *Getman* approach because he realized that it implied a power in the judiciary to restrict disclosure to the requester whose use was approved – a power that Judge Leventhal concluded the judiciary lacks. *Ditlow,* 517 F.2d at 172 n.21. It appears to us that Judge Leventhal anticipated *FBI v. Abramson,* 456 U.S. 615 (1982), when he noted that "it is questionable whether Congress intended to create such a broad exception to the 'any person' provision by adopting the 'clearly unwarranted' language of exemption 6." *Ditlow,* 517 F.2d at 172 n.21. In *Abramson,* the Court held that "Congress did not differentiate between the purposes for which information was requested. . . . Congress . . . did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis." *Abramson,* 456 U.S. at 631 (citation omitted).

construct its own hierarchy of the public interest in disclosure of particular information. As we said in our panel opinion, *Reporters Comm.*, 816 F.2d at 741, such an unbounded delegation would raise serious constitutional problems. *Cf. Illinois v. United States*, 460 U.S. 1001, 1004-06 (1983) (Rehnquist, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion). It is true that the Supreme Court (and this court) has held that the federal courts in applying Exemptions 6 and 7(C) must weigh the public interest against the privacy interest and determine whether disclosure would be an unwarranted invasion of the privacy interest. *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (Exemption 6); *FBI v. Abramson*, 456 U.S. 615, 631 (1982) (Exemption 7(C)). That of course means that the federal courts must, as we have done in this case, consider whether there is a cognizable privacy interest in the information sought, and then appraise the impairment to that interest that would result from disclosure. For instance, had it been shown to us that disclosure of Medico's "rap sheet" would cause him particular harm, even though his privacy interest is slight, we might well have reached a different conclusion. But, that we must balance the prospective damage to the privacy interest against the public's interest does not necessarily mean, and as we conclude, could not mean, that the public interest depends on our own appraisal of the public's need to know particular information.

II.

The petition for rehearing sharpens another argument the government previously presented: The Justice Department compilation of criminal histories, by putting the public record information in different form, somehow

changes the nature of the information sought. Our dissenting colleague now agrees with this argument. Dissent at 2. But it seems to us this argument is undermined by the government's contention, with which the dissent also agrees, dissent at 4-5, that if the Department refers a requester to the original source it provides the requester with essentially the basic information sought – at least the fact that criminal history information exists. The requester can then go to the original source and, if the information is publicly available, easily obtain it.[4] That, of course, is true, but if such referral is tantamount to disclosure, it is abundantly clear that the form of the government's compilation of criminal histories is immaterial to the issue of whether disclosure of the facts compiled is required. *Cf. Abramson*, 456 U.S. at 624 (holding that information originally gathered for law enforcement purposes by the FBI did not lose its status under Exemption 7 because it was placed in a different compilation for a political purpose by the White House).

The government and the dissent also claim that our analysis of Charles Medico's privacy interest implies a delegation to a state or local body for a policy determination. Dissent at 1. Not so. We direct the district court only to make a factual determination in these kinds of cases: Has a legitimate privacy interest of the subject in his rap sheets faded because they appear on the public record? *Reporters Comm.*, 816 F.2d at 740. That a particular state may treat its own compilations of criminal histories drawn from public record information on file in cities and counties as confidential is irrelevant to that determination. The

[4] If the Department knows that particular information is *not* publicly available at its source, it obviously would be inappropriate to refer a requester to the source. As we said in the panel opinion, this is an option available to the Department if it does not know one way or the other whether the information is publicly available.

district court's task is limited to determining, as a matter of fact, not law, whether, by reason of the actual practices of the jurisdiction that is the original source, the subject's privacy interest has faded. It may well be, as both the government and dissent suggest, that state statutes that limit disclosure of compilations of criminal histories are eminently sensible and should guide federal policy. But as we said in our panel opinion:

> Congress could of course decide the public ought not have access to federal compilations of public criminal records. Congress has considered such a possibility in the past, and might do so again. *See, e.g., Dissemination of Criminal Justice Information: Hearings on H.R. 188, H.R. 9783, H.R. 12574, and H.R. 12575 Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1973).

Reporters Comm., 816 F.2d at 741 n.15. The point, of course, is that Congress, unlike a number of states, has chosen not to pass a statute that would establish the federal policy that appellees now urge us to announce without a legislative mandate. We decline their suggestion because we do not believe we have the authority to accept it.

Our conclusion in this case therefore does not change. We reverse and remand to the district court to determine whether the Department of Justice holds criminal record information on Charles Medico that, in accordance with our opinion, must be disclosed.

STARR, *Circuit Judge, dissenting*: I respectfully dissent from denial of the petition for rehearing. After reflecting on the filings, I have come to the conclusion that the panel's opinion is wrong; worse still, it will likely lead to unfortunate consequences, misconstruing as it does FOIA Exemption 7(C) and, by analogy, Exemption 6 as well.

The panel opinion speaks for itself, and its rationale therefore need not be reviewed in detail. Suffice it to say that the panel majority, finding the balancing process ordained by Congress to be too "awkward," embarked on a quest for someone to defer to in making determinations under Exemption 7(C).[1] Discerning in this case a determination by political bodies that the criminal-record information sought here was to be "public," the panel accordingly found any privacy interest eviscerated; at the same time, it found a significant public interest in disclosure by virtue of these same political determinations. As my concurring opinion in the case sought to point out, this approach reflected no *de novo* balancing at all;[2] it was, rather, a single-factor test.

I nonetheless concurred in the judgment and indicated my general agreement with the majority's privacy-interest analysis, limiting my criticisms to its public-interest analysis. On the latter score, I wholeheartedly disagreed with my colleagues. *See Reporters Committee*, 816 F.2d at 743 (concurring opinion). Now, the filings on rehearing, including a helpful *amicus* brief surveying state legislation regarding the confidentiality of criminal histories,[3] have led me to conclude that the majority's entire analysis in section II, 816 F.2d at 737-43, is flawed.

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[1] The majority's analysis also impacts upon Exemption 6, as noted above. *See Reporters Committee*, 816 F.2d at 738, n.11, 742 n.17.

[2] *See* 5 U.S.C. § 522(a)(4)(B) (1982) ("In such a case the court shall determine the matter de novo. . . .").

[3] The amicus brief was filed conditionally, together with a motion for leave to file, see Fed. R. App. P. 29, by SEARCH Group, Inc., the State of California Department of Justice, and the State of New York Division of Criminal Justice Services. SEARCH Group is, I gather, a

First. In its original presentation to the panel, the Government argued that while the underlying information was indeed "public" in the sense that it was on record at local courthouses or police stations, the particular items sought by appellants are of a different character by virtue of their cumulative, indexed, computerized nature. The panel opinion rejected this argument, *see Reporters Committee,* 816 F.2d at 739, concluding instead that the public availability at the "original source" was the only relevant fact. *See id.* at 743. After reviewing the rehearing petition, I am now of the view that our conclusion was wrong.

As I see it, computerized data banks of the sort involved here present issues considerably more difficult than, and certainly very different from, a case involving the source records themselves. This conclusion is buttressed by what I now know to be the host of state laws requiring that cumulative, indexed criminal history information be kept confidential, as well as by general Congressional indications of concern about the privacy implications of computerized data banks. *See* H.R. Rep. No. 1416, 93d Cong., 2d Sess. 3, 6-9 (1974), *reprinted in Legislative History of the Privacy Act of 1974, Source Book on Privacy,* 296, 299-302 (1974).

Second. With respect to the majority's public-interest analysis, I need not restate the objections already voiced in my concurrence. Suffice it to say that the majority fails to carry out its obligation to make a separate valuation of that interest under the precedents of this circuit and the Supreme Court.

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non-profit corporation, governed by a Membership Group comprised of Governors' appointees from each State. SEARCH Group deals with the collection, maintenance, and dissemination of state criminal history records. The California and New York agencies are, it appears, the entities responsible for the operation of the criminal history repository within their respective States.

The majority vigorously objects to an analysis of the public interest that depends upon the identity of the requester or the use to which the information will be put. Even granting the majority's position that calls into question a rigorous application of our court's analysis in *Getman* v. *NLRB,* 450 F.2d 670 (D.C. Cir. 1971), this still does not leave the Congressionally mandated public-interest standard devoid of meaning. This is scarcely the place to speculate about the public-interest analysis in a post-*Getman* era but rather than give *Getman* no burial, I think a few words should be said out of respect.

Getman's critical insight is that there *is* meaning in the public-interest standard; the way in which meaning is imparted to that term will depend on the information that is sought and the circumstances in each case. Where what is at stake is the disclosure of personal information about a particular subject, one helpful vantage point is the public interest in the subject of the information request. Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant public interest—one that overcomes the substantial privacy interest at stake—in the rap sheet of a public figure or an official holding high government office. For guidance in fleshing out that analysis, it seems sensible to me to draw upon the substantial body of defamation law dealing with "public personages." *See e.g., Providence Journal Co. v. F.B.I.,* 460 F. Supp. 778, 790-91 (D.R.I. 1978) (striking differing balances in an Exemption 7(C) case depending upon whether the information obtained through an illegal wiretap concerned the subject's dealings with public figures), *rev'd,* 602 F.2d 1010 (1st Cir. 1979) (holding *all* information obtained in this manner exempt from disclosure), *cert. denied,* 444 U.S. 1071 (1980). But

however fruitful that analytical mode may (or may not) eventually prove to be in the post-*Getman* era, the fundamental point is that the public interest in any particular case *can* vary beyond the "general disclosure policies of the statute," Majority Statement at 5, and is to be seriously weighed against the subject's privacy interest.[4]

Third. The Bureau and the District Court will have considerable difficulty in applying the majority's single-factor test in future cases. The rehearing filings highlight two problems.

In the first place, the Government points out that the FBI will often have no way of knowing whether a particular item in a particular criminal history compilation is, in fact, "publicly available at the original source," *Reporters Committee,* 816 F.2d at 743, without a specific inquiry to the source at the time of the FOIA request. To require the Bureau to undertake such inquiries is to impose a substantial (if indeed not crippling) administrative burden. The majority's response to this unhappy, practical result of our holding is that "the Department might satisfy its obligations under FOIA . . . by merely referring appellants to the law enforcement agency that provided the information to the Department." *Id.* (footnote omitted). In its rehearing petition, the Government suggests that this "option" is illusory; to refer a requester in the manner suggested by the majority would only confirm that criminal history information exists, which may be the most pertinent (if not the only) "fact" that a requester is seeking. Government's Rehearing Petition at 10 n.9.

[4] I by no means suggest that the public-figure analysis will apply, much less govern, in the entire universe of Exemptions 6 and 7 (C) cases. For example, in one recent case, this court considered under the public-interest prong of the analysis the public interest in fair and honest disciplinary proceedings. *Carter v. United States Department of Commerce,* 830 F.2d 388, 390 (D.C. Cir. 1987).

In the second place, the rehearing filings make it abundantly clear that an entirely different level of "political determinations," *Reporters Committee,* 816 F.2d at 741, exists. That is, most state legislatures have expressly provided that cumulative, indexed criminal history information of the type sought here is to be held confidential. *See, e.g.,* Cal. Penal Code § 11105 (West Supp. 1986); Conn. Gen. Stat. Ann. §§ 54-142i(c), 54-142n (West 1985); Hawaii Rev. Stat. § 846-9 (1985); Tenn. Code Ann. §§ 40-15-106(b)-(c), 40-32-101(b)-(c) (1982). The exact approach and precise degree of confidentiality, not surprisingly, varies significantly from State to State.[5] But the common theme is nonetheless one of confidentiality.

Moreover, the majority provides no guidance to the Bureau or the District Court as to the source of law for determining whether the information is "publicly available at the original source." Often the state legislature requires both that the underlying criminal history source records be publicly available *and* that cumulative, indexed criminal history information be kept confidential. *Compare* Ohio Rev. Code Ann. § 1901.31(E) (Anderson Supp. 1986) (court proceedings shall be public records) *with* Ohio Rev. Code Ann. § 109.57(E), (D) (Anderson 1984 & Supp. 1986) (criminal history information to be held confidential). In the latter situation—which would appear to be the rule rather than the exception—I fear that the District Court will be left on remand with no criteria for determining whether the privacy interest of the subject in his rap

[5] This fact, of course, leaves the majority vulnerable to the charge that its new deference approach is just as "idiosyncratic," *see Reporters Committee,* 816 F.2d at 741, as the previous balancing analysis, which at least had the virtue of being grounded in the statutory language (and had the virtue of extensive caselaw authority).

sheet has "faded." Majority Statement at 7-8. Instead the District Court will be left with only the majority's original direction to look to availability at the "original source," as well as the majority's initial rejection of the argument that cumulative, indexed, computerized information was somehow different.

Thus it is that I must confess that I was wrong the first time around. The rehearing filings have convinced me that the panel opinion's entire Exemption 7(C) analysis is in error. Its transmogrification of *de novo* balancing into a deference-driven, single-factor test does violence to what had heretofore been settled law. In the process, it raises the unsettling prospect of future FOIA requests tailored precisely to fall within the dictates of *Reporters Committee*. We are now informed that many federal agencies collect items of information on individuals that are ostensibly matters of public record. For example, Veterans Administration and Social Security records include birth certificates, marriage licenses, and divorce decrees (which may recite findings of fault); the Department of Housing and Urban Development maintains data on millions of home mortgages that are presumably "public records" at county clerks' offices. Government's Rehearing Petition at 2. Under the majority's approach, in the absence of state confidentiality laws, there would appear to be a virtual per se rule requiring all such information to be released. The federal government is thereby transformed in one fell swoop into *the* clearinghouse for highly personal information, releasing records on any person, to any requester, for any purpose. This Congress did not intend.

Quite apart from the potentially daunting administrative burden this will impose, I harbor the gravest concerns that this new-fangled regime will have a pernicious effect on personal privacy interests in conflict with Congress'

express will. Congress chose not to enact separate exemptions for each set of personal files kept by the federal government, but chose instead to delegate to the courts the task of making the ultimate determination with respect to disclosure on the basis of criteria that Congress set. Surely we should not eschew this task because we find it awkward. The rehearing filings have referred the court to previously unknown legal authorities, arguing strongly that the information sought here should be held confidential. We should abandon right now our unfortunate departure from traditional FOIA analysis; having repented, we should then conduct an old-fashioned Exemption 7(C) balancing.

In that process, we would be well advised to consider these state laws as one, quite powerful factor. In carrying on the traditional Exemption 7(C) analysis I would, on reflection, conclude that the privacy interest here outweighs the limited public interest in Charles Medico. On that basis, I would affirm the District Court's judgment. As my colleagues have concluded otherwise, I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 79-03308

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

[Filed July 25, 1985]

ORDER

The plaintiffs filed this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552. The case is now before the Court on the cross-motions for summary judgment filed by the parties. After giving careful consideration to the motions, the oppositions thereto, the arguments of counsel made on May 3, 1985, and the record in this case, the Court concludes, for the reasons set forth in the accompanying memorandum, that the plaintiffs' motion should be denied, and the defendants' motion should be granted.

In view of the above, it is hereby

ORDERED that the plaintiffs' motion for summary judgment is denied, and it is further

ORDERED that the defendants' motion for summary judgment is granted, and it is further

ORDERED that this case is dismissed with prejudice.

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

July 24, 1985

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-03308

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

[Filed Aug. 5, 1985]

MEMORANDUM

The plaintiffs filed this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The case is now before he Court on cross-motions for summary judgment which were argued on May 3, 1985.

I

The plaintiffs requested the defendants to furnish the criminal records of

> William Medico (deceased), Phillip Medico, Charles Medico or Samuel Medico, specifically information about any prison sentences served in federal prisons, any convictions in federal courts, any indictments by federal grand juries or any arrests by federal law enforcement authorities; additionally, information known to 'he Department of Justice about prison

> sentences, convictions, indictments or arrests by state or local courts and law enforcement agencies involving these four persons.

Complaint Exhibit 1. Eventually, the defendants furnished the information relating to William Medico, who was deceased, but declined to furnish the requested information relating to Phillip Medico, Charles Medico or Samuel Medico. This action was filed and thereafter, Phillip Medico and Sam Medico died. The defendants noting that those persons had died since the filing of this FOIA request, advised the plaintiffs, "[w]e therefore conducted a new search of the Criminal Division central index but found no documents responsive to your request concerning these two deceased individuals. If a rap sheet had been discovered during a search of Criminal Division records, it would have been referred to the Federal Bureau of Investigation (FBI) for direct response to you under the FOIA." Notice of Filing: Defendants' Suggestion of Partial Mootness, Exhibit 2. The defendants went on to advise the plaintiffs that, "[t]he Criminal Division continues to maintain that it can neither confirm nor deny whether any other criminal information concerning a Charles Medico might be found in its records. Disclosure of any other criminal information concerning a Charles Medico would constitute either a clearly unwarranted or an unwarranted invasion of privacy". In effect, all the defendants did after the deaths of Phillip Medico and Samuel Medico, was to acknowledge that no rap sheets as to those two persons exist.

As to Charles Medico, who is living, the defendants continue to refuse to release the requested information except, that they note that the plaintiffs advise and the defendants have "administratively discerned . . . a legitimate public interest in the administrative disclosure

of 'financial crime' information".[1] The defendants then went on to advise the plaintiffs that a review of the records revealed no "financial crime information concerning a Charles Medico".

The only issues now pending before the Court are (1) whether any criminal information which might be summarized in a 28 U.S.C. § 534 "rap sheet" should be disclosed, and (2) whether similar information found in any other non-public agency records should be disclosed in the absence of a countervailing public interest. The defendants contend that the withheld information is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(3), (6), or (7)(C). This Court agrees.

II

The information contained on a rap sheet, created pursuant to 28 U.S.C. §534, is exempt from disclosure pursuant to that statute since that statute falls within the scope of FOIA Exemption 3. Exemption 3 withholds from disclosure records

> Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3). Information contained in a rap sheet, prepared pursuant to Section 534, would include arrest as well as convictions. For example, in the rap sheet

[1] The plaintiffs had suggested, in some of their pleadings, the term "financial crime" as relating to bribery, embezzlement, and other financial crimes.

ultimately released relating to William Medico, it is noted that Mr. Medico was arrested in 1928 and in 1931 for suspicion of murder and a violation of the National Prohibition Act and later released, that he was arrested in 1934 on two occasions for being a "disorderly person", and was sentenced to serve time in jail, and that he was arrested in 1961 as a fugitive, but the disposition is reflected as "ignored".

The duty to compile such records is set forth in 28 U.S.C. § 534. That section provides that the Attorney General is to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records" and that he is to "exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions". Significantly, however, the section goes on the provide that "[t]he exchange of records authorized by [the section] is subject to cancellation if dissemination is made outside the receiving departments or related agencies". Section 534(b).

This Court is satisfied that pursuant to the above section, the information acquired and collected by the Attorney General may be released only to the agencies, organizations or states set forth in that section, and may not be released to the general public. Thus, the information is "[s]pecifically exempted from disclosure by statute [28 U.S.C. § 534]" which "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue". The Court therefore concludes that if the defendants have collected and maintained a rap sheet related to Charles Medico, that rap sheet is exempt from disclosure pursuant to Exemption 3. *See Krohn* v. *United States Department of Justice*, Civil No. 79-0667 (D D.C. March 19, 1984). The plaintiffs are not entitled to receive the rap sheets, if any exist, and accordingly, the

defendants are entitled to summary judgment on this issue.

III

The plaintiffs also request other documents which contain information found in other non-public agency records. The Court concludes that that information is exempt from disclosure under Exemptions 6 and 7C of the FOIA (5 U.S.C. § 552(b)(6) and (7)(C)).

Exemption 6 provides that "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" are exempt from disclosure under the FOIA. Exemption 7C provides that "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy" are exempt from disclosure.

For the purpose of Exemption 6, the Court is satisfied that the information found in non-public records which contains "rap sheet information" may be classified as contained in files which are "similar files", because that information is personal to the individual named therein. Clearly, there is little or no difference between that information and "personnel and medical files" as described in Exemption 6. It is also clear that the information acquired by the defendants was acquired for law enforcement purposes. The only question remaining then is whether the release of that information would constitute "a clearly unwarranted invasion of personal privacy" pursuant to Exemption 6 or a "unwarranted invasion of privacy" pursuant to Exemption 7C. The Court must therefore balance the "interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information". *Depart-*

ment of Air Force v. *Rose,* 425 U.S. 352, 372, 96 S.Ct. 1592, 1604 (1976) (footnote omitted).

Under the facts of this case, the Court concludes that the material is exempt pursuant to both Exemption 6 and Exemption 7C. The plaintiffs have made known why they are requesting the information concerning Charles Medico. Here, the defendants have advised the plaintiffs that they would release any and all information concerning "financial crimes" which may have been committed by Charles Medico. Such information has been released; the defendants have advised the plaintiffs that a search of their records indicate that there is no financial crime information concerning a Charles Medico. The other information which *may* be contained in those non-public documents relating to Charles Medico *may*, if any such information exists, include criminal information on matters not related to the matter under consideration by the plaintiffs. It seems highly unlikely that information about offenses which may have occurred 30 or 40 years ago, as in the case of William Medico, would have any relevance or public interest. The same can be said for information relating to the arrest or conviction of persons for minor criminal offenses or offenses which are completely unrelated to anything now under consideration by the plaintiffs. That information is personal to the third party (Charles Medico), and it if exists, its release would constitute "a clearly unwarranted invasion of personal privacy". The Court concludes therefore that those documents and that information are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(6) and (7)(C).

In view of the above, the plaintiff's motion for summary judgment will be denied and the defendant's motion for summary judgment will be granted.

In order that the record is clear, the Court will require the defendants to file a statement, *in camera*, with the

Court in response to plaintiff's request for information concerning Charles Medico. The only reason for this direction is so that (1) the records will be before the Court of Appeals in the event of any appeal, and (2) so that the Court, after reviewing that document, if any exist, may reconsider its decision, *sua sponte*, if such action appears to be warranted. In this connection the Court's review will be limited to whether the information may be classified as financial crime information.[2]

An appropriate order has been issued.

Dated: August 5, 1985

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

[2] The defendants shall furnish the information to the Court within ten days of the filing of this memorandum. If, after reviewing what has been furnished to the Court, the Court concludes, *sua sponte*, that it should reconsider its earlier decision, the Court will notify the parties so that the defendants will have a further opportunity to respond before such information, if any exists, is released. On the other hand, if the Court concludes that there is no need to reconsider this issue, either because no such information exists, or because such information, if it does exist, need not be disclosed pursuant to the FOIA, the Court will merely file a brief memorandum noting that it sees no reason to reconsider its decision.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-03308

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

[Filed Aug. 16, 1985]

MEMORANDUM

Pursuant to the Memorandum filed in this case on August 5, 1985, specifically slip op. 8-9, and n. 2, the parties are advised that the Court will not reconsider its decision in this case. All *in camera* submissions are sealed and made a part of the record. *See* Court Exhibit 1 (under seal).

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6020
Civil Action No. 79-03308

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

No. 85-6144
Civil Action No. 79-03308

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed Apr. 10, 1987]

Before: STARR and SILBERMAN, Circuit Judges, and MCGOWAN, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District

of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby vacated and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

BY:/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Dated: April 10, 1987
Opinion for the Court filed by Circuit Judge SILBERMAN.
Concurring opinion filed by Circuit Judge STARR.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6020
Civil Action No. 79-03308

REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

[Filed Oct. 23, 1987]

ORDER

BEFORE: STARR and SILBERMAN, Circuit Judges; McGOWAN, Senior Circuit Judge

Upon consideration of appellees' petition for rehearing, the response, and the brief *amicus curiae* of Search Group, Inc., et al., it is

ORDERED, by the Court, that the petition for rehearing is denied, for the reasons set forth in the opinion of the Court filed this date.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK
BY:/s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Opinion for the Court filed by Circuit Judge Silberman.
Dissenting Opinion filed by Circuit Judge Starr.
October 23, 1987

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6020
Civil Action No. 79-03308

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

AND CONSOLIDATED CASE NO. 85-6144

[Filed Dec. 4, 1987]

ORDER

Before: WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, Circuit Judges

Appellees' suggestion for rehearing *en banc* has been circulated to the full court along with the brief for Search Group, Inc., et al., as *amicus curiae*, and appellants' brief in response to appellees' petition and suggestion. The taking of a vote on the suggestion was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellees' suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:/s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Starr, joined by Circuit Judges Bork, Buckley and Sentelle, is attached.

Circuit Judge D.H. Ginsburg did not participate in this order.

No. 85-6020 Reporters Committee for Freedom of the Press v. DOJ

Statement of Circuit Judge Starr dissenting from the denial of rehearing en banc, joined by Circuit Judges Bork, Buckley, and Sentelle:

The panel's decision in this case represents a clear departure from the law of this circuit. In addition, the result reached by the panel majority is profoundly wrong. Opening up the vast storehouse of computerized criminal histories to FOIA requests, regardless of how remote and negligible the public interest in such sensitive documents may be, is unfortunate and misconceived. I would grant the suggestion for rehearing *en banc* and restore stability and common sense to this vital area of our law.

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